

No. 42891-1-II

Court of Appeals
DIVISION II
STATE OF WASHINGTON

VINCENT A. AND SUSAN J. DHANENS,
APPELLANT,

v.

ROSS AND KATHLEEN MCWAID,
RESPONDENT,

BY  DEPUTY

STATE OF WASHINGTON

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FILED
COURT OF APPEALS
DIVISION II

RESPONDENTS ROSS AND KATHLEEN MCWAIDS' BRIEF

OWENS DAVIES FRISTOE
TAYLOR & SCHULTZ, P.S.
Matthew B. Edwards
1115 West Bay Drive, Suite 302
Olympia, Washington 98502
(360) 943-8320
WSBA No. 18332

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III. INTRODUCTION

Ross and Kathleen McWaid, respondents, ask this Court to affirm the trial court's decision confirming the McWaids' right to use all of a Road Easement, and its decision confirming the McWaids' right to use a small, triangular section of an asphalt roadway lying outside the Road Easement. In addition, the Court should find the Dhanens' appeal frivolous, and award terms.

IV. COUNTER STATEMENT OF THE ISSUES

Brief Factual Summary. Over 20 years ago, the original developer of lakefront property cut in an access road which ran over several other lots to the border of the last lot accessed by the road. This last lot had two flat areas on it, a lower area next to the lake, and a higher area intended as a homesite. As cut in by the developer, the road forked about 90 feet before it reached the boundary of the last lot, one fork leading down to the lower area near the lake, and the other fork leading up to the prospective homesite.

The developer assured the purchaser of the last lot that the purchaser would have vehicular access to both of the flat areas on his lot. At the same time as the purchaser bought the lot, the developer recorded a Road Easement. The Road Easement states that its purpose is to allow "full and unrestricted use of the parcels of real property served by said access roadway." The Road Easement widens from 40 to 60 feet wide at the point where the road forks, in order to accommodate the forking in the road.

Later, acting pursuant to the obligation which it specifically assumed in the Road Easement, and before selling any of the other lots, the developer constructed the asphalt surface of the roadway. Unbeknownst to the developer or purchaser, a small triangular

section of the asphalt roadway surface at the end of the lower fork of the roadway lay outside the area legally described in the Road Easement.

For the next approximately 13 years, the original purchaser and his successors regularly used the roadway, including the lower fork, to access the lower area on the last lot for purposes of accessing the lake, fishing, camping, and enjoying the as-yet-unimproved property.

In 2004, the McWaides purchased the last lot, and began building a house on the homesite. About six months after construction had commenced, their neighbors, the Dhanens, informed the McWaides that the small triangular section of the lower fork of the roadway lay outside the Road Easement area. The Dhanens asked the McWaides to stop using that small triangular section only.

The McWaides, acting with the Dhanens' oral and written consent, excavated into the hillside in the Road Easement to create an additional flat travelling surface. This allowed the McWaides to continue to use the lower fork of the roadway to access the lakefront portion of their property, but without crossing the small triangular area of the asphalt roadway surface that lay outside the Road Easement area.

In 2009, the Dhanens asserted, for the first time, that the McWaides were not entitled to use the lower fork of the roadway at all thus depriving the McWaides of all meaningful access to the lakefront portion of their property. In June 2010, the Dhanens physically blocked the lower fork. The McWaides then filed this lawsuit.

Issue 1: Did the trial court properly construe the Road Easement as permitting the McWaides to utilize the entire Road Easement area to obtain access to both the lakefront and homesite portions of their property?

Short Answer: Yes. The trial court properly considered the Road Easement’s language, the original developer’s intent, the circumstances surrounding the easement’s execution, and the manner in which the easement had been used to determine that the McWaids were entitled to utilize the entire Road Easement area for the purpose of obtaining access to both the lakefront and homesite areas on the property.

Issue 2: Under the “common grantor doctrine,” should the boundary of the access roadway as actually established by the original developer control over the legal description contained in the Road Easement?

Short Answer: Yes. Because the developer had cut in the location of the roadway before selling the lot, because when selling the last lot the developer had reserved the right and obligation to lay down the asphalt roadway surface, and because the developer had in fact laid down and established the actual the roadway surface before he sold any lots to other purchasers, the “common grantor doctrine” applies. Pursuant to that doctrine, the boundary of the access road as actually laid down by the common grantor controls.

Issue 3: In the alternative, should the trial court’s judgment that the McWaids hold a prescriptive easement over the small triangular portion of the asphalt roadway surface lying outside the Road Easement area be affirmed?

Short Answer: Yes. Because the McWaids’ predecessors consistently used the lower fork of the roadway to access the lakefront portion of the McWaid parcel, the trial court properly held that the McWaids had established a prescriptive easement.

Issue 4: Is the Dhanens’ appeal frivolous, such that the McWaids should be awarded fees and costs?

Short Answer: Yes. The Dhanens have failed to properly assign error to any of the trial court’s Findings of Fact. The trial court’s specific and detailed Findings amply support its Conclusions of Law. Therefore, the Dhanens’ appeal is frivolous, and the Court should award the McWaid the fees and costs that they have incurred on appeal.

V. COUNTER STATEMENT OF FACTS

A. The lots and road at issue.

Ross and Kathleen McWaid own property (the “McWaid property”) abutting Lake St. Clair in Thurston County, Washington. Findings, ¶ 1 and 2; Ex. 15. The McWaid’s property has a flat, level area down by the lake (the “lakefront”). Above this is a very steep hill. Midway up the hill there is a second flat area where the McWaid’s home is situated (the “homesite”). Findings, ¶ 2; Ex. 6, 28, 30.

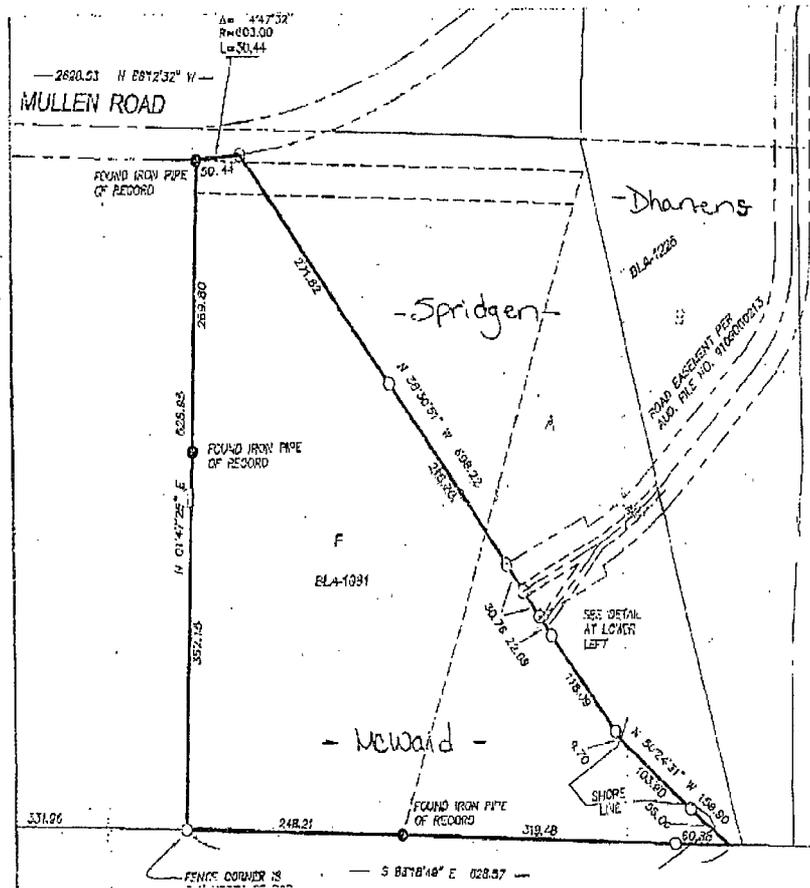
The Dhanens own the two waterfront lots next to the McWaid property. Findings, ¶ 3-6. The Dhanens purchased the first of these two lots (the “Dhanens’ property”) in October 1997. Ex. 9; Findings, ¶ 55. The Dhanens have lived in a home on that lot ever since.

Mike Spridgen purchased the second lot (the “Spridgen property”)—which lies between and abuts both the McWaid and the Dhanens’ property—on October 21, 1992. Ex. 7; Findings, ¶ 38. Mr. Spridgen sold this lot to the Dhanens in June 2003. Ex. 14; Findings, ¶ 70. The Spridgen property is not developed. The fork in the asphalt roadway surface, and everything beyond, lies on the Spridgen property. Ex. 18. See Appendix B.

The McWaid use an asphalt roadway that starts at Mullen Road, crosses other properties, crosses over the Dhanens’ property, and then crosses over the Spridgen property to access their property. The asphalt roadway forks as it approaches a point about 90 feet away from the McWaid property. One approximately 12 foot wide fork

runs down to provide access to the lakefront portion of the McWaid property. The second approximately 12 foot wide fork runs up to the homesite portion of the McWaid property. The asphalt roadway surface of both forks end right at the border of the McWaid property. Findings, ¶ 22-26.

The following diagram shows the relative locations of the properties, the easement, and the roadways:



B. Friend, the original developer, cuts in the road, installs utilities, and sells the McWaid property to Larry Kaufman.

Friend & Friend Enterprises, whose principal was John Friend (hereinafter collectively referred to as “Friend”) originally owned the McWaid property, the Spridgen property, the Dhanens’ property, and adjoining property. Findings, ¶ 7. At the time

Friend owned it, all the land was undeveloped. Friend subdivided the property into lots, and installed the road and utilities that serve the McWaid and other properties. Findings, ¶ 8, 11.

Friend first cut in the road that led to the McWaid property in the spring and summer of 1991. Findings, ¶ 8. Friend also created the flat area near the lakefront portion of the McWaid property, which he used to log the property. Findings, ¶ 11.

Friend also installed utilities, including power and telephone, to serve the McWaid property. Findings, ¶ 20. The utilities that Friend installed ran on side of the road closest to Lake St. Clair. *Id.* The utilities end at a utility box that Friend installed at the end of the lower fork of the road. *Id.* The utility box is located on the McWaid property, just past its border with the Spridgen property. *Id.*

In the summer of 1991, Larry Kaufman spoke to Friend about the possibility of purchasing the McWaid property. Findings, ¶ 8-9. Mr. Kaufman worked for Kaufman Brothers Construction, a reputable Thurston County construction company. Findings, ¶ 9; RP 34:8-10. Mr. Kaufman was looking for a piece of property at Lake St. Clair that had waterfront access, and a view. Findings, ¶ 10; RP 35:14-15, 36:3-4.

Mr. Kaufman was interested in the property only if he was provided with vehicular access to both the lower, lakefront portion and to the upper, homesite portion of the property. Findings, ¶ 10. Mr. Kaufman planned to build a house on the homesite portion of the property, and he planned to build a boathouse and dock on the lakefront portion of the property. RP 40:22-24.

Mr. Kaufman testified that, as a condition of his agreement to purchase, Friend promised that he would be provided vehicular access to both the lakefront and homesite portions of the property:

I was trying to figure out how I would be able to get access to the lower part and the upper part and discussing that with John Friend. I asked for a way to do that. And he was going to bring a road in as—as it is here. But he also—I asked him to put an access down below, bring it—build a road down to below and one up above. And he provided that as part of a condition of this.

RP 37:6-14. See also Findings, ¶ 10-11. Mr. Kaufman would not have purchased the McWaid property from Friend if Mr. Kaufman had not understood he was being provided vehicular access to both the lakeside and homesite areas on the McWaid property. Findings, ¶ 17.

In September 1991, Friend sold the McWaid property to Larry Kaufman for a consideration of \$92,000.00. Ex. 4; Findings, ¶ 18. The trial court found this price to be consistent only with a lot having meaningful waterfront access. *Id.*

On the same day as he recorded the real estate contract by which he sold the McWaid property to Kaufman, Friend also recorded a Road Easement and Maintenance Agreement (the “Road Easement”). Findings, ¶ 12; Ex. 3. See Appendix A. The Road Easement describes and creates an easement running from Mullen Road across, et al, the Dhanens and Spridgen properties to the McWaid property. *Id.* See also Ex. 18 (Appendix B). This easement is 40 feet wide for most of the easement’s length. Findings, ¶ 13. However, as it approaches the McWaid property, just before the point where the roadway forks, it widens to 60 feet at a point 94.42 feet from the McWaid property. *Id.*

Paragraph 1 of the Road Easement provides for “a perpetual, non-exclusive easement for the construction, maintenance, use, and operation of a road for ingress, egress, and utility purposes . . .” Ex. 3; Findings, ¶ 14. Paragraph 2 of the Road Easement obligated Friend to perform the “initial construction of the easement road at [Friend’s] expense.” *Id.* Paragraph 3 of the Road Easement states “the surface of the roadway shall be maintained as to allow free and reasonable passage of such vehicular traffic as may be reasonable and necessary in order that all parties may enjoy full and unrestricted use of the parcels of real property served by said access roadway.” *Id.*

Friend’s interest in recording the Road Easement was to provide ready access to all portions of the properties it was planning to sell in order to maximize the price at which each of the properties would sell. Findings, ¶ 15. Friend caused the Road Easement to widen to 60 feet at a point 94.42 feet from the McWaid property in order to accommodate the forking of the roadway, so as to provide Mr. Kaufman and his successors in interest with vehicular access to both the lakefront and homesite areas of the McWaid property. Findings, ¶ 16.

C. As provided in the Road Easement, and before selling any other lots, Friend constructs the asphalt roadway surface.

Friend actually installed the asphalt roadway surface sometime in the spring or summer of 1992. Findings, ¶ 19. See also RP 44:15-25. Friend did not have the boundary of the road easement surveyed or marked on the ground prior to or while constructing the asphalt roadway surface. Findings, ¶ 21. Friend installed the asphalt roadway surface before selling any of the other lots it had created to any other purchasers. Findings, ¶ 37.

Following the road it had cut in in 1991, the asphalt roadway constructed by Friend splits into two forks at approximately the point where the road easement widens from 40 to 60 feet in width. Findings, ¶ 23. One fork consists of an asphalt surface, approximately 12 feet in width centered approximately in the middle of the roadway easement. This fork runs in a straight line from the point where the roadway forks to the border of the McWaid property, where it continued onto the rough road cut in by Friend to provide access to the upper “homesite” portion of the McWaid property. Findings, ¶ 24. The second fork consists of an asphalt surface, approximately 12 feet in width, that runs downward in a straight line from the point where the roadway forks in a more easterly direction. This fork of the asphalt roadway ends at the border of the McWaid property where it continues onto the rough road constructed by Friend on the McWaid property to provide access to the lakefront portion of the McWaid property. Findings, ¶ 25.

The McWaids submitted an aerial photograph taken by the Department of Transportation on July 31, 1992. Ex. 6. This aerial photograph was taken shortly after Friend had constructed the asphalt roadway surface. Findings, ¶ 26. The aerial photograph shows both the paved forks of the easement road with the end of the pavement at the boundary of the McWaid property clearly visible. *Id.* The aerial photograph shows unpaved roads extending directly off the paved forks to both the building site and lakefront areas of the McWaid property. *Id.* The aerial photograph shows the landing area near the lakefront portion of the McWaid property, as described by Lawrence Kaufman. *Id.* Other aerial photographs submitted by the McWaids clearly show all these same features. Ex. 28; Findings, ¶27-28.

After Friend constructed the asphalt roadway surface, Mr. Kaufman used it, including both the upper and lower forks, to access his property. Findings, ¶ 32. Mr. Kaufman did so believing that both the upper and lower fork of the roadway were located within the area described in the Road Easement, and believing that he had the right to use both forks of the roadway:

Q. Did you believe that both forks to that roadway lay within that—the area described in that Road Easement?

A. Yes I did.

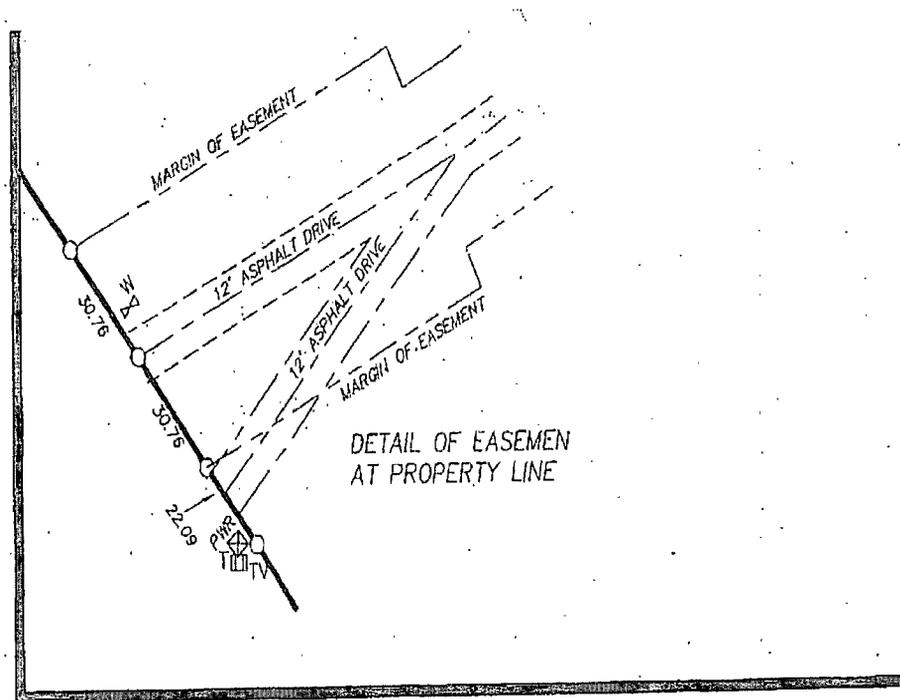
RP 45:25-46:3.

Q. Did you believe that you had the right to use both forks of that asphalt roadway surface that approached your property to access your property?

A. Yes I did. I believe that that was why the easement was created and widened there, to provide me with access to the road that went down on my property. That's what—that's what I had—what I understood. That's why we—the way I wanted it.

RP 45:13-20.

In fact, unbeknownst to Friend and Kaufman, a small triangular section of the lower fork of the roadway constructed by Friend lay outside the area described in the Road Easement:



Ex. 18; Findings, ¶ 29. The fact that a small triangular portion of the lower fork of the roadway surface is located outside the Road Easement area is not apparent from a visual inspection of the roadway. Findings, ¶ 30. Neither Friend, nor Kaufman was aware that the small triangular section of the lower fork of the asphalt roadway surface lay outside the Road Easement area. Findings, ¶ 31.

D. Mr. Kaufman uses the McWaid property to camp on it, to fish from it, to access the lake, and to enjoy the view.

Larry Kaufman owned the McWaid property from September 1991 until he sold it to Andrew Schell in September 2000. Findings, ¶ 32 and ¶ 56; Ex.'s 4, 13. During this entire period, Mr. Kaufman lived in a house about 15-20 minutes away. Findings, ¶ 32; RP 48:2-7. Mr. Kaufman regularly accessed and utilized the McWaid property and both forks of the road leading to the McWaid property in exactly that manner one would expect an owner of undeveloped lakefront property to access and utilize such property: to

camp on it, to fish from it, to access the lake, and to enjoy the view from the property. Findings, ¶ 32. See also RP 46:23-47:16, RP 64:10-65:2; CP 297-308.

Mr. Kaufman did nothing to hide or conceal his use of the McWaid property. Findings, ¶ 33. His use of the property was capable of being observed by his neighbors. *Id.* Mr. Kaufman regularly accessed and used the property in the manner described above for the entire period of his ownership of the property. *Id.*, ¶ 35. The trial court specifically found that Mr. Kaufman’s testimony about his acquisition and use of the property to be credible, and accepted it. *Id.*, ¶ 36.

E. Andrew Schell purchases and uses the McWaid property.

Andrew Schell purchased the McWaid property from Larry Kaufman in September 2000. Ex. 13; Findings, ¶ 56. Mr. Schell purchased the property for \$100,000.00, a price the trial court found was consistent only with a lot providing meaningful waterfront access. *Id.* See also RP 74:6-8 (“We wouldn’t have bought the property if we didn’t have access to the lake.”). Like Mr. Kaufman, Mr. Schell planned to build a house on the homesite portion of the property and to build a dock down by the water. RP 73:13-16.

Like Mr. Kaufman, Mr. Schell believed and understood that he had the right to use the entire asphalt roadway, including both of the 12 foot wide forks that led to the lakefront and homesite portions of the property. Findings, ¶ 60. RP 73:17-19.

I mean, both roads were there. We used that road every time—I mean, we used that access down to the lake every time we visited the property. That’s how we got to the lake.

RP 73:22-47:1.

Like Mr. Kaufman, Mr. Schell and his family also regularly accessed and used the McWaid property, and both forks of the road leading to the McWaid property, in exactly

the manner that one would expect an owner of undeveloped lakefront property to access and utilize such property: to camp on it, to access the lake, and to enjoy the view from the property. Findings, ¶ 58. Mr. Schell used the road to access the property “usually on the weekends,” “whenever we actually trained dogs out in the area.” RP 74:18-19.

We had this thing for like four years. So we went out there probably more than a dozen times. And we camped out there with our family probably—I don’t know—several times.

RP 75:15-19.

Mr. Schell accessed and used the McWaid property in this manner for the entire period of his ownership of the property. Findings, ¶ 61. The trial court specifically found that Mr. Schell’s testimony concerning his acquisition and use of the McWaid property to be credible, and accepted it. Findings, ¶ 62.

F. The McWaids buy the property and build a house.

In 2004, Mr. Schell sold the McWaid property to Ross and Kathleen McWaid. Ex. 15, Findings, ¶ 71. The McWaids purchased the property for a consideration of \$165,000.00, a price which the trial court found was consistent only with the McWaids having a meaningful access to the lower lakefront portion of their property. *Id.*

Shortly after they purchased the property, the McWaids began constructing a home on the upper, homesite portion of the property. Findings, ¶ 72. During the course of construction, the McWaids and their contractors regularly used both the upper and lower fork of the roadway to access the McWaid property. Findings, ¶ 73.

G. The Dhanens claim that a section of the asphalt on the lower fork is outside the Road Easement, but object only to the McWaids’ use of that part of the lower fork outside the Road Easement.

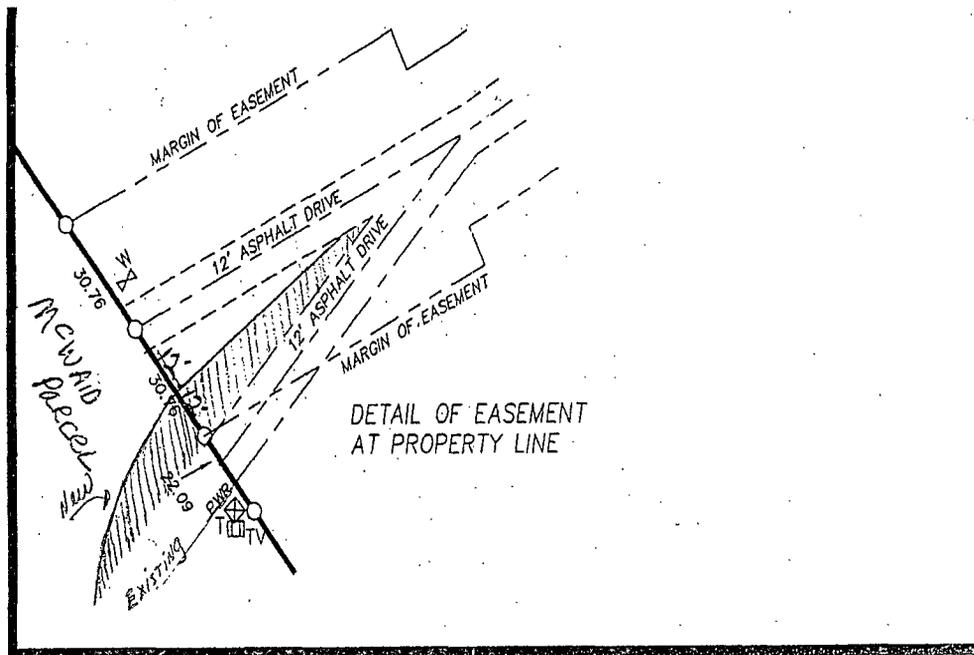
In December 2004, about five or six months after the McWaids had begun constructing the home, Mr. Dhanens had a conversation with Mr. McWaid. Findings,

¶ 74. During this conversation, Mr. Dhanens claimed that a section of the lower fork of the asphalt roadway surface lay outside the Road Easement. Findings, ¶ 75. Mr. Dhanens objected to the McWaids' use of that section of the road lying outside the Road Easement. *Id.* Mr. Dhanens did not object to the McWaids using any part of the lower fork of the asphalt roadway surface within the Road Easement. *Id.*

The Dhanens had their attorney send the McWaids a letter following up this conversation. The letter stated, in part, that: "You are entitled to travel over the Dhanens land on the existing road within the described easement." Ex. 16; Findings, ¶ 78.

H. With the Dhanens' consent, the McWaids construct a travelling surface within the Road Easement to permit the McWaids to access the lakefront without using the triangular portion of the asphalt roadway outside the Road Easement.

The McWaids had a survey performed, which to their surprise, confirmed that a triangular section of the lower fork of the roadway did lie outside the Road Easement. Findings, ¶ 80. In order to avoid the trouble and expense associated with asserting a legal right to this section of the roadway, the McWaids formed a plan to excavate the hillside separating the two forks of the roadway in the Road Easement to shift the travel surface slightly. This would permit them to access to the lakefront portion of the McWaid property while travelling entirely within the Road Easement. Findings, ¶ 80.



In April 2005, the McWaid's began excavating the hillside between the forks to carry out this plan. Findings, ¶ 81. Mr. Dhanens physically obstructed the work. Findings, ¶ 83. After a dispute, Mr. Dhanens and Mr. McWaid had a discussion, at the conclusion of which Mr. Dhanens consented to the McWaid's completion of the excavation work, and to the McWaid's subsequent use of the travelling surface created thereby. Findings, ¶ 84-85.

The Dhanens memorialized this discussion in a letter which they sent to the McWaids. Ex. 22; Findings, ¶ 89. See Appendix E. In this letter, the Dhanens stated that they never intended to prevent the McWaids from using the lower fork of the roadway. *Id.* The Dhanens confirmed the consent that they had granted to the McWaids for the completion of the work. *Id.* The Dhanens then stated two specific conditions to which the consent they were granting was subject. *Id.* Nothing in this letter suggested that the consent that the Dhanens were granting would be revocable for any reason other than non-compliance with the two expressly stated conditions. Findings, ¶ 90. Had the Dhanens intended their consent to be conditioned on anything other than the two conditions expressly stated in the letter, the Dhanens would have said so in this letter. Findings, ¶ 91.

Based on the Dhanens' consent, the McWaids completed the excavation, and installed a retaining wall. The McWaids graveled the flat area created, and installed a gate at the border of the property at the now appropriate location. Findings, ¶ 92. See also Ex. 30.

Between 2005 and 2009, the McWaids continued to use the lower fork of the asphalt roadway surface, except for the triangular section outside the Road Easement area together with the flat area they had excavated into the hillside to obtain access to the lower flat lakefront portion of their property. Findings, ¶ 93.

I. In 2009, the Dhanens assert, for the first time, that the McWaids were not entitled to use the lower fork of the Road Easement. In 2010, they then physically blocked the roadway.

In 2009, the Dhanens asserted, for the first time, that the McWaids were not entitled to use any portion of the lower fork of the roadway at all. Findings, ¶ 94. In June 2010, based on this new claim, the Dhanens physically blocked the lower fork of the

roadway, effectively preventing the McWaides from accessing the lakefront portion of their property. Findings, ¶ 95.

J. The McWaides file a lawsuit and obtain a temporary restraining order.

In response, the McWaides filed this lawsuit. The McWaides filed a motion for a preliminary injunction order. CP 309-318. In support of this motion, the McWaides filed the declarations of Larry Kaufman, Andrew Schell, and Ross McWaid, all of which were considered by the trial court. CP 297-308, 295-96, 282-94, and 342-355.¹

The trial court granted the McWaides' motion for preliminary injunction in part. CP 357-59. The trial court's order only restrained the Dhanens from interfering with the McWaides continued use of the portion of the lower fork of the asphalt roadway surface that lay within the Road Easement area, and of the additional flat surface that the McWaides had constructed with the Dhanens' consent in 2005. *Id.*

K. The McWaides move for summary judgment on the "common grantor" doctrine.

The McWaides then filed a summary judgment motion. CP 103-109. In the motion, they asserted that they were entitled to have their right to utilize the entire asphalt roadway surface confirmed based on the "common grantor doctrine." *Id.*

Opposing the motion, the Dhanens asserted two reasons why the common grantor doctrine did not apply. CP 114-190. First, the Dhanens claimed that the doctrine only applied to fee simple boundaries, and not to the boundaries of easements. CP 116-18. Second, the Dhanens claimed that the doctrine did not apply because Friend had not installed the roadway until after Friend had sold the property to Kaufman. CP 119-20. (At the time of the argument of the motion, none of the parties realized that Friend had

¹ These materials accordingly became part of the record at trial. CR 65(a)(2).

cut in the roadway in the summer of 1991, before Friend sold the McWaid property to Kaufman. Findings, ¶ 8).

The trial court agreed with the Dhanens on this second issue. Accordingly, the trial court found, as a matter of law, that the common grantor doctrine did not apply. Transcript of April 29, 2011 Motion Hearing at p. 25, lines 9-11.

L. After a three day trial, the trial court finds for the McWaids.

On October 5, 6, and 7, 2011, the parties tried this case to Honorable Thomas McPhee. Over the course of three days, Judge McPhee heard the testimony of 9 different witnesses. CP 200-201. Judge McPhee admitted 39 exhibits into evidence. CP 221-24. Judge McPhee also took the view of the premises. CP 201 (lines 3-4).

Judge McPhee issued his oral decision on October 14, 2011. CP 226-255. In his lengthy oral decision, Judge McPhee carefully described each of the issues that had been raised by the parties, identified and summarized the testimony and other evidence that had been presented on each issue by the parties, and described how and why he was resolving each of the issues. *Id.*

Based on the Judge McPhee's oral ruling, the McWaids proposed Findings of Fact and Conclusions of Law. CP 200-255. The Dhanens raised no objection to the proposed Findings and Conclusions, acknowledging that they accurately summarized the Findings and Conclusions that had been reached by the trial court. Judge McPhee entered the Findings and Conclusions, and a Judgment, on November 18, 2011. CP 054-77; CP 78-82.² See Appendices F and 6.

² The Findings and Conclusions originally entered by Judge McPhee inadvertently omitted the exhibits which were to be attached thereto. The parties subsequently stipulated to the entry of substitute, identical Findings and Conclusions, with the exhibits attached. CP 256-57; CP 200-255.

VI. STANDARD OF REVIEW

Generally speaking, this Court engages in a two step process when reviewing a matter tried to a trial court.

First, the Court reviews properly-challenged Findings of Fact to determine whether they are supported by substantial evidence in the record. *Littlefair v. Schulze*, _____ Wn. App. at ¶ 8, _____, _____ P.3d _____ (2012). Evidence is substantial if it allows a rational fair-minded person to find the disputed fact. *Id.*; *Wenatchee Sportsman Ass'n. v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The prevailing party is entitled to have the appellate court view all evidence and inferences from the evidence in the light most favorable to that party. *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006). An appellate court should not substitute its evaluation of the evidence for that made by the finder of fact. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 82-83, 877 P.2d 703 (1994). Moreover, because the trial court had the opportunity to directly observe the demeanor of the witnesses while testifying, an appellate court should defer to the trial court's assessment of the credibility of witnesses. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). Factual findings that are not challenged are verities on appeal. *Morriage v. Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

Here, the Dhanens have not properly challenged any of the trial court's Findings of Fact. RAP 10.3(g) required the Dhanens to identify, the specific findings which they claim the trial court entered in error:

Special provision for assignments of error

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the Finding by

number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

The Dhanens failed to comply with this rule. They have not identified, with specificity, the trial court's Findings to which they assign error. Therefore, all of the trial court's Findings of Fact should be treated as verities on appeal. *Pellino's v. Brinks, Inc.*, 164 Wn. App. 668, 682 ¶ 27, 267 P.3d 383 (2011). See also *Littlefair*, ___ Wn. App. at ___, ¶ 8 ("We consider unchallenged findings to be verities on appeal").

VII. ARGUMENT

A. The trial court's determination that the McWaids are entitled to use the entire Road Easement for the purpose of securing effective, meaningful access to both the homesite and lakefront portions of their property was correct, and should be affirmed.

The first issue presented to the trial court involved the construction and effect of the Road Easement. The trial court concluded that the McWaids were entitled to use the entire Road Easement area for the purpose of securing effective, meaningful access to both the homesite and lakefront portions of their property. Conclusions 2-14. This ruling was correct, and should be affirmed.

In determining the scope of an express easement, a court should "look to the easement's language, the intention of the parties connected with the original easement, the circumstances surrounding the easement's execution, and the manner in which the easement has been used." *810 Properties v. Jump*, 141 Wn. App. 688, 696 at ¶ 20, 170 P.3d 1209 (2007).

Here, the Road Easement's language, the intention of the parties who executed the Road Easement, the circumstances surrounding the Road Easement's execution, and Friend's actions in constructing the roadway after executing the easement all unmistakably point to the conclusion that Friend intended the Road Easement to provide

the owners of the McWaid property with access to both the homesite and lakefront portions of the McWaid property.

The Road Easement's language is clear. Ex. 3. Paragraph 1 of the Road Easement provides for "a perpetual, non-exclusive easement for the construction, maintenance, use, and operation of the road for ingress, egress, and utility purposes. . . ." Paragraph 2 of the Road Easement obligated Friend to perform the "initial construction of the easement road at [Friend's] expense." Paragraph 3 of the Road Easement states "the surface of the roadway shall be maintained to allow free and reasonable passage of such vehicular traffic as may be reasonable and necessary **in order that all parties may enjoy full and unrestricted use of the parcels of real property served by said access roadway.**" *Id.* (Emphasis added.)

The parties' intentions and the circumstances surrounding the easement's excavation demonstrate the clear intent to provide the access to both the lakefront and homesite portions of the McWaid property. The McWaid property had substantial value as a lakefront lot, but only if a purchaser were provided meaningful access to the lakefront. Findings, ¶ 15-16. Larry Kaufman testified that he was interested in buying the lot only if Friend provided him meaningful vehicular access to the lakefront portion of the property. Findings, ¶ 10, 17. In response, Friend acted to provide him such access. Findings, ¶ 11. Mr. Kaufman bought the property in reliance on that assurance. Findings, ¶ 17. The trial court specifically found Mr. Kaufman's testimony to be credible, and accepted it. Findings, ¶ 36. The Road Easement which Friend recorded in fact widened at exactly the point where such widening would be necessary to

accommodate the forking of the road to provide access to both the lakefront and homesite portions of the McWaid property. Ex. 3; Findings, ¶ 16.

Finally, the parties' actions subsequent to the execution of the easement confirm that the easement was meant to provide access to both flat areas on the McWaid property. When Friend constructed the asphalt roadway surface a few months after recording the Road Easement, Friend asphalted both forks of the roadway right up to the border of the McWaid property. Findings, ¶ 22-25. Friend intended that the owners of the McWaid property would use the lower fork to access the lakefront portion of the McWaid property. Findings, ¶ 16. And Mr. Kaufman and each subsequent owner of the property testified that they in fact regularly used the lower fork of the roadway to access the lakefront portion of the property. Findings, ¶ 34, 60, 73.

The trial court's Findings of Fact concerning the language of the easement, the intention of the parties connected with the original easement, the circumstances surrounding the easement's execution, and the manner in which the easement has been used are each supported by substantial evidence. These Findings of Fact unmistakably point to the trial court's Conclusions of Law: that the Road Easement was intended and should be construed to permit the McWaid's to use the entire easement area to achieve meaningful vehicular access to both the homesite and the lakefront portions of their property.

The Dhanens argue that the trial court erred by allowing the McWaid's the right to "unilaterally" construct an "additional route" to access their property within the easement area. See Dhanens' Brief, p. 3. This argument fails for three reasons.

First, the McWaids did not “unilaterally” construct anything. In 2005, after the Dhanens had objected to the McWaids use of the section of the roadway surface laying outside the Road Easement area, the McWaids excavated into the hillside located within the Road Easement area in order to shift the travelled surface slightly so as to permit the McWaids to access the lakefront portion of their property while remaining entirely within the Road Easement. Findings, ¶ 74-93. The McWaids did the work necessary to create the additional travelling surface with the Dhanens’ oral and written consent! Findings, ¶ 85, 90-91.

Second, the McWaids did not construct an “additional route.” After the Dhanens informed the McWaids that a small section of the asphalt roadway surface at the end of the lower fork lay outside the Road Easement area, and that the Dhanens objected to the McWaids’ use of that area only, the McWaids reasonably reacted by shifting the travelling surface of the lower fork slightly to the side, so that the McWaids could access the lakefront travelling across only area within the Road Easement. Findings, ¶ 80, 85, 88, 92. The McWaids did not construct an “additional route;” they shifted the travelling surface of the lower fork to keep within the Easement Area.

Finally, as a matter of law, the McWaids have the right to use the entire Road Easement for access to their property. The fact that Friend had laid down the asphalt roadway surface at one location within the Road Easement area did not preclude the McWaids from utilizing the rest of the Road Easement area for the purpose of achieving effective access to their entire property. *Compare 810 Properties*, 141 Wn. App. at 699, ¶ 29 (the holder of an express 30 foot access easement had the right to utilize the entire 30 feet for access; the holder’s rights to use the entire easement area did not diminish as a

result of the previous construction and use of a roadway only 15 feet wide within the easement area). See also *Littlefair*, _____ Wn. App. _____, ¶ 17 (noting that an easement scope generally does “not contract merely because the holder fails to use the entire easement area.”).

The Washington State Supreme Court’s decision in *City of Seattle v. Nazarenius*, 60 Wn.2d 657, 655 (1962) squarely supports the trial court’s conclusion that the McWaids are entitled to utilize the entire Road Easement area. In *Nazarenius*, the City held an easement for the construction, operation and maintenance of electric transmission lines. 60 Wn.2d at 658. The defendant constructed additions to a dwelling that encroached within the easement area. *Id.* After the defendant encroached, the City changed the location of the electrical transmission lines, moving them closer to the encroaching addition, but keeping them within the area legally described in the easement. *Id.* at 662.

The defendant argued that the City, by originally laying its transmission lines in one location, had thereby fixed the location where it was entitled to place the transmission lines. *Id.* The Washington Supreme Court squarely rejected this contention. *Id.* It held that “where the easement agreement specifically describes the location of the right-of-way,” the City had the right to utilize and move the line anywhere within the right-of-way. *Id.* In so doing, the Washington Supreme Court distinguished cases involving “floating easements”—i.e., easements where the area subject to easement was not specifically described in the easement. *Id.*

Nazarenius’ squarely applies to this case. Just as in *Nazarenius*, the McWaids are beneficiaries of a written easement that contains a precise description of the area subject

to the easement. Ex. 3. Just as in *Nazarenus*, the McWaids' predecessor in interest laid down the roadway at a specific location within the described easement area. Ex. 18. Just as in *Nazarenus*, the McWaids shifted the location of the roadway, keeping it within the described easement area. Just as in *Nazarenus*, the McWaids were entitled to do this.

In sum, the trial court properly construed the Road Easement as permitting the McWaids to make use of the entire Road Easement for its expressly stated purpose of allowing them "full and unrestricted use" of the McWaid property. The trial court's detailed Findings of Fact, which have not been specifically challenged by the Dhanens, are amply supported by evidence in the record. The trial court's Conclusions of Law flow logically from its Findings. The trial court's decision that the McWaids are entitled to utilize the entire Road Easement area—including both the paved surface of the lower fork lying within the Road Easement area and the additional travelling surface the McWaids constructed in 2005, with the consent of the Dhanens—should be affirmed.

B. The trial court's determination that the McWaid's should be entitled to continue to use the triangular section of the asphalt roadway surface located outside of the Road Easement was correct, and should be affirmed.

Affirmance of the trial court's construction of the Road Easement leaves one issue remaining: are the McWaids entitled to continue to make use of the small triangular portion of the asphalt roadway surface located at the end of the lower fork outside the Road Easement area? The Court should affirm the trial court's ruling that the McWaids are entitled to use the entire paved roadway surface for either one of two separate reasons.

First, because Friend laid down the roadway before it sold the property to Mr. Kaufman, laid down the asphalt surface acting pursuant to an obligation he assumed when selling the McWaid property to Kaufman, and because Friend did so before selling

any parcel to anyone else, the McWaids are entitled to use the asphalt roadway surface pursuant to the “common grantor doctrine.” Second, because the McWaids’ predecessors regularly used the lower fork to access the lakefront portion of the property for well over a ten year period, the trial court’s determination that the McWaids had acquired a prescriptive easement over the triangular section laying outside the Road Easement was correct and should be affirmed.

1. Because Friend, the common grantor, fixed the location of the roadway, because Friend had reserved the right and obligation to lay down the asphalt roadway surface and because Friend in fact established the actual boundary of the roadway surface before it sold any lots to any other purchasers, the common grantor doctrine applies.

The common grantor doctrine is a rule based in equity that operates in a manner similar to estoppel. It arises from the recognition that a common grantor who owns the property on both sides of a boundary which the common grantor establishes has it completely within his power to determine the location of that boundary. *Thompson v. Bain*, 28 Wn.2d 590, 592-93, 183 P.2d 785 (1947). One who purchases property from a common grantor therefore has the right to rely on the practical location of the boundary as actually established by the common grantor upon the ground. *Atwell v. Olson*, 30 Wn.2d 179, 183-84, 190 P.2d 793 (1948); *Fralick v. Clark County*, 22 Wn. App. 156, 159, 589 P.2d 273 (1978). It is fair to bind subsequent purchasers to the boundary actually established by the common grantor because the boundary’s actual location is evident from a visual examination of the property. *Levien v. Fiala*, 79 Wn. App. 294, 302, 902 P.2d 170 (1995); *Thompson v. Bain*, 28 Wn.2d 590, 592-93, 183 P.2d 785 (1947).

A party asserting the under common grantor doctrine must therefore show two things: (1) that the common grantor practically established a boundary on the ground at

different location than the legally-described boundary, and (2) that a visual examination of the property would indicate to subsequent purchasers of the burdened property that the legally described line was no longer functioning as the true boundary. *Winans v. Ross*, 35 Wn. App. 238, 241, 666 P.2d 908, citing *Fralick*, 22 Wn. App. at 160.

Here, the common grantor doctrine applies. Friend owned all of the property affected by the roadway at the time it originally constructed the roadway. Findings, ¶ 7-8. Friend, the “common grantor,” thus had it in its sole power practically to locate the boundaries of the roadway.

Friend obligated itself to construct the asphalt roadway surface in the 1991 Road Easement which Friend recorded at the same time as it sold the McWaid property to Larry Kaufman. Ex.’s 3, 4. Friend actually laid down the asphalt roadway surface a few months later, thus establishing the boundary of the roadway providing access to the lakefront portion of the McWaid property. Findings, ¶ 19. Friend did all of this before it sold any other parcel to anyone else. Findings, ¶ 37.

The McWaid established that Friend, the common grantor, had it in his power to practically establish the boundary of the access roadway, did so, and acted before selling the lot over which the roadway ran to a third party. The McWaid thus established that the common grantor doctrine applies, such that the boundary of the access roadway as established by Friend should control over the boundary legally described in the Road Easement.

Defendants assert that the Common Grantor Doctrine does not apply to easements. This is apparently an issue of first impression.

Logically, the common grantor doctrine should, in the appropriate case, apply to the boundary of an easement, just as it does to any other boundary. A common grantor who owns property on both sides of an easement on which he is constructing an access road has the power to construct the boundaries of that road in exactly the same way in which a common grantor would have the ability to practically locate a boundary in fee simple. A common grantor who practically locates an access road induces reliance in his grantee in exactly the same way as the common grantor induces reliance when practically locating a boundary in fee simple. And, it is just fair to charge subsequent takers with constructive notice of the common grantor's location of the access roadway boundary as a fee simple boundary because the practical location of the roadway is readily ascertainable by visual inspection.

Because the equitable rationales underlying the common grantor doctrine apply with equal force to both boundaries in fee simple, and to boundaries of easements, the Court should hold that the common grantor doctrine applies in each case.

Second, the Dhanens argued, and the trial court agreed, that the common grantor doctrine did not apply because Friend had not constructed the asphalt roadway surface *before* selling the McWaid property to Mr. Kaufman. Under the specific facts presented to it, this was a distinction that should have made no legal difference.

At the time it sold the McWaid property to Mr. Kaufman, Friend had in fact already cut in the roadway at its existing location. Findings, ¶ 7-8. Friend had constructed the fork leading to the lakefront area of the McWaid property, and had constructed the flat landing area on the McWaid property which it used to log the McWaid property. Findings, ¶ 8. Friend had assured Mr. Kaufman that he would be

provided vehicular access to the lakefront portion of the property. Findings, ¶ 10-11. Mr. Kaufman purchased the property based on the assurance that he would be provided such access. Findings, ¶ 17.

It is true that, at the time of sale, Friend had not laid the asphalt surface down over the roadway which Friend had already cut in. But Friend had specifically reserved the right and obligation to construct the asphalt surface in the Road Easement document. Ex. 3, ¶ 2. Friend recorded the Road Easement on the same day as, and as part of the same transaction as, the sale of the McWaid property to Mr. Kaufman. Findings, ¶ 12, 17. Friend actually laid down the asphalt roadway surface by no later than July 31, 1992. Findings, ¶ 19. See also Ex. 6. And, Friend laid down the asphalt roadway surface *before* he sold any other lots in the subdivision. Findings, ¶ 37.

On these specific facts, the Court should hold the common grantor doctrine applies. The boundary of the access road as practically established by Friend controls over the legal description in the Road Easement document. For this first separate, independent reason, the trial court's decision to confirm the McWaids' right to use the triangular section of the asphalt roadway surface located outside of the area legally described in the Road Easement was correct, and should be affirmed.

2. The McWaids have established the elements of a prescriptive easement over the roadway constructed by Friend, including the small portion of it lying outside the Road Easement Area.

In the alternative, the McWaids have established each of the elements of a prescriptive easement over the triangular section of the asphalt roadway surface constructed by Friend lying outside the Road Easement Area.

In order to establish that they are entitled to a prescriptive easement, the McWaids have the burden of establishing that they, or their predecessors in interest, used the

asphalt surface roadway in a manner that was open, notorious, continuous, uninterrupted, hostile and adverse for a period of ten years. Here, the McWaids established each of these elements.

First, the McWaids established that they and their predecessors' use of the asphalt surface roadway was "open" and "notorious." A use is "open" and "notorious" if it is a use of that kind that is visible, not concealed, and is such as would charge a reasonable person in the owner's position with notice of the use. 17 Washington Practice: Real Property Law § 2.7 at p. 101.

Here, the location of the roadway, the only function of which was to provide the owners of the McWaid property access to the lakefront area of the McWaid property, was "open" and "notorious." See Conclusions, ¶ 12. Mr. Kaufman and Mr. Schell each testified that they used the lower fork of the roadway to access the lakefront portion of their property believing they had the right to do so, and without making any attempt to conceal their use of that roadway, or of the use of the lakefront portion of the property which could only be accessed by that roadway, from their neighbors. Findings, ¶ 32-36, 58-61. The McWaids established that their predecessor's use of the roadway was "open and notorious."

The McWaids also established that the use of the roadway was "continuous" and "uninterrupted." To establish "continuous" and "uninterrupted" use, the McWaids need not establish that there was a "constant" use of the lower fork of the roadway. To the contrary, the McWaids were required only show a use that was consistent with the way in which a true owner of the property would have used the roadway, considering its nature and location. *Lee v. Lozier*, 88 Wn. App. 176, 185, 945 P.2d 214 (1997), citing cases.

But where a roadway is physically constructed on the ground, its presence is continuous. An easement holder's seasonal use of a roadway where the roadway itself is permanently established, and where seasonal use is the use to which a true owner could be expected to put the roadway, constitutes a "continuous and uninterrupted use." *810 Properties v. Jump*, 141 Wn. App. 688, 702 ¶ 39, 170 P.3d 1209 (2007).

For example, in *Lee*, neighbors made intermittent recreational use of a dock, a portion of which was located on the plaintiff's property. The property owner argued that because the neighbor's use of the dock was "sporadic and seasonal," the use was not "continuous" or "uninterrupted." *Id.* at 185. This Court ruled that the claimants did not need to establish that they had made a "constant" use of the dock. *Id.* Instead, this Court ruled "the claimant need only demonstrate use of the same character that a true owner might make of the property considering its nature and location." *Id.*, citing *LL Properties, Inc. v. Crandall*, 51 Wn. App. 149, 158, 751 P.2d 1208 (1988). In *Lee*, because the claimants had shown that their use of the dock was consistent "with the uses made by other owners with similarly-situated docks," the claimant had demonstrated "continuous" and "uninterrupted" use. *Id.*

Here, the asphalt roadway surface was there to be seen from the time Friend constructed it. The asphalt roadway led directly to the border of the McWaid property, where it continued onto the unasphalted road and flat area which Friend had constructed on the lower part of the McWaid property to permit and provide access to the lake. Mr. Kaufman and Mr. Schell testified that they each used this roadway to access their property in exactly the frequency and manner one would expect of the owners of not-yet-improved lakefront property to use such a roadway: to access their property in order to

camp on it, to fish from it, to get to the lake, and to generally enjoy the property. Findings, ¶ 32, 58. That is all the McWaids were required to show to establish “continuous” and “uninterrupted” use, and the trial court correctly found that the McWaids had in fact shown just that.

Next, the McWaids established an “adverse” and “hostile” use. “Adverse” and “hostile” use is use such as the true owner would exercise. An adverse user asks permission from no one, and uses the property under a claim of right. *Granston v. Callahan*, 52 Wn. App. 288, 293, 759 P.2d 462 (1988) quoting *Malnati v. Lamstead*, 50 Wn.2d 105, 108, 309 P.2d 754 (1957).

Here, Mr. Kaufman and Mr. Schell each believed they had the right to use the entire roadway surface. Findings, ¶ 33-34, 58-59. They made exactly that use of the roadway, including the lower fork of the roadway, as the holder of a right to use the entire asphalt surface would make. They did not seek permission from the Dhanens to use the entire roadway surface. The Dhanens did not grant such permission. The McWaids established a “hostile” and “adverse” use.

Finally, the use occurred over a more than ten year period. Mr. Kaufman testified that his use began shortly after he purchased the property in 1991, and continued consistently until he sold the property to Mr. Schell in 2000. Findings, ¶ 32, 35. Mr. Schell testified he used the property in a similar manner to Mr. Kaufman until selling to the McWaids in 2004. Findings, ¶ 58, 61. The period of use was well over the required ten years.

In sum, the trial court’s Findings of Fact on these issues have not been challenged, and in any event are supported by substantial evidence. The Findings support the trial

court's ultimate conclusion that the McWaids had established each of the elements necessary to make out a prescriptive easement over the small triangular section of the asphalt roadway surface located outside the Road Easement. For this second, separate, independent reason, the trial court's judgment confirming the McWaids' right to utilize the triangular section of the asphalt roadway surface which Friend constructed outside the Road Easement area was correct, and should be affirmed.

C. This appeal is frivolous. Therefore, the Court should award the McWaids their attorney's fees.

Finally, and respectfully, the McWaids assert that this appeal is frivolous. Therefore, the Court should award the McWaids their attorney's fees on appeal.

RAP 18.9(a) authorizes this Court to impose sanctions upon a party who files a frivolous appeal. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. *Green River Community College, Dist. No. 10 v. Hire Educ. Personnel Bd.*, 107 Wn.2d 427, 730 P2d 653 (1986).

Here, the McWaids did everything they could to avoid becoming embroiled in this lawsuit. In 2005, when the Dhanens objected to their use of the small triangular section of the asphalt roadway surface lying outside the Road Easement area, rather than initiate litigation, and having obtained the Dhanens' express permission, the McWaids moved the travelled surface of the roadway so that they could use it while remaining within the Road Easement area. The McWaids filed this lawsuit only after the Dhanens then completely changed their position and asserted that the McWaids could not use any portion of the lower fork of the roadway at all (and hence that the McWaids could not

meaningfully access or use the lakefront portion of their lakefront property), and only after the Dhanens physically blocked the McWaids from utilizing the lower fork.

The Dhanens forced the McWaids to incur the considerable expense associated with going to trial to confirm what was abundantly obvious: that the McWaids had the right to utilize the access roadway which their common grantor had constructed more than 20 years earlier and which the McWaids and their predecessors had consistently used to access the lakefront portion of their lakefront property.

The Dhanens now seek to impose considerable additional expense on the McWaids by pursuing this appeal. But, the Dhanens did not properly challenge any of the trial court's Findings of Fact. The Dhanens have not come close to meeting their burden of showing that those Findings of Fact are not supported by evidence in the record. And the trial court's Findings of Fact amply support its Conclusions of Law.

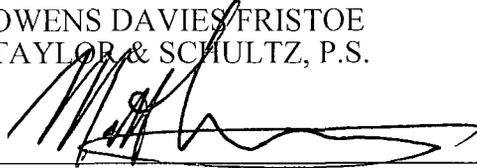
The Dhanens forced the McWaids to incur the very substantial cost of litigation this case to sustain the right to use their lakefront property. The Dhanens are not entitled to impose further very substantial litigation costs on the McWaids by pursuing this frivolous appeal. In addition to affirming the trial court, this Court should find that the Dhanens' appeal was frivolous, and award the McWaids their attorney's fees incurred in connection with this appeal.

VIII. CONCLUSION

This Court should affirm the trial court's construction of the Road Easement as permitting the McWaids to utilize the entire easement area to obtain effective, meaningful access to both the lakefront and homesite portions of the McWaid property. Under either the common grantor doctrine, or under the theory of prescriptive easement,

this Court should also confirm the McWaids' right to continue and utilize the triangular section of the asphalt roadway surface constructed by Friend in 1992 to access the lakefront portion of their property. Finally, the Court should find that the Dhanens' appeal is frivolous, and award the McWaids the attorney's fees they incurred on appeal.

OWENS DAVIES FRISTOE
TAYLOR & SCHULTZ, P.S.

A handwritten signature in black ink, appearing to read 'Matthew B. Edwards', is written over a horizontal line. The signature is stylized and somewhat cursive.

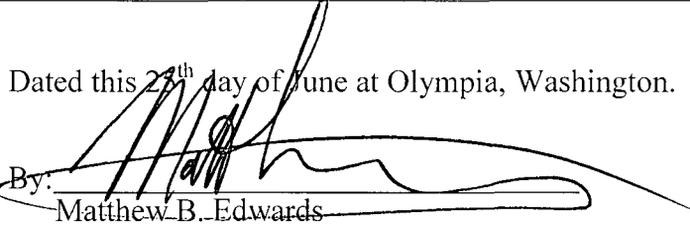
Matthew B. Edwards, WSBA No. 18332
Attorneys for Ross and Kathleen McWaid

CERTIFICATE OF SERVICE

I certify that on the 25th day of June, 2012, I caused a true and correct copy of this Respondents Ross and Kathleen McWaid's Brief to be served on the following in the manner indicated below:

Alan J. Wertjes, Attorney for Vincent and Susan Dhanens
Wertjes Law Group, P.S.
1800 Cooper Point Road SW, Building 3
Olympia, Washington 98502
Via e-mail and Regular U.S. Mail

Dated this 27th day of June at Olympia, Washington.

By: 
Matthew B. Edwards

FILED
COURT OF APPEALS
DIVISION II
2012 JUN 25 PM 1:17
STATE OF WASHINGTON
BY _____
DEPUTY

APPENDICES

A.	1991 Road Easement and Maintenance Agreement	Trial Ex. 3
B.	Survey of property	Trial Ex. 18
C.	Blow up of portion of survey showing end of lower fork of roadway	Trial Ex. 18
D.	Diagram showing approximate location of additional travelling surface created by McWaids	CP 351
E.	Letter from Dhanens to McWaids granting permission to construct and utilize additional travelling surface	Trial Ex. 22
F.	Findings of Fact and Conclusions of Law	CP 200-255
G.	Judgment	CP 78-82

APPENDIX A

Road Easement and Maintenance Agreement (Trial Exhibit 3)

As Recorded To
Shore Excise

EXHIBIT A
ROAD EASEMENT
AND
MAINTENANCE AGREEMENT

THURSTON COUNTY
OLYMPIA, WA
09.06.91 3:46 PM
REQUEST OF ASHTON, R
300 S. Reed, AUDITOR
BY MIKE, DEPUTY
7-00 EAS

THIS EASEMENT AND AGREEMENT is made and entered into this 18 day of July, 1991, by FRIEND AND FRIEND ENT., INC., hereinafter referred to as the "FRIENDS";

WITNESSETH:

Voll 1258 Page 645
File No 9109050213

WHEREAS, the Friends are the owners of the following described real property:

Lot C D E F of BLA# 1031

Voll 1257 Page 119
File No 9109030087

WHEREAS, the Friends hereto desire to construct a permanent common access road for their properties to Friendly Lane, and desire that a formal easement be established; and

WHEREAS, the Friends hereto further desire, on behalf of themselves and their heirs, successors and assigns, to contract for the perpetual maintenance of said roadway;

NOW THEREFORE, in consideration of the terms, conditions, covenants and performance contained herein, the Friends hereto agree as follows:

1. **EASEMENT GRANTED.** Friend & Friend Ent, Inc. as Grantors, do hereby grant and convey to its successors and assigns, as Grantees, a perpetual, non-exclusive, easement for the construction, maintenance, use and operation of a road for ingress, egress, and utility purposes, to serve the property described hereinabove which easement is legally described as follows:

An easement 40.0 feet wide (60.0 ft. where noted) located in the SE 1/4 of the NW 1/4 of and the NE 1/4 of the SW 1/4 of Sec. 31, T18N, R1E, WM. Thurston County, Wa.

Commencing at the center 1/4 corner of Sec. 31 T18N, R1E, WM;
Thence; North 1° - 46' - 09" East, a distance of 423.31 feet to the southerly r/w line of Mullen Road. Thence South 79° - 05' - 01" West along said South right of way line a distance of 142.96 ft. to the True Point of Beginning of said easement centerline;
Thence; South 04° - 46' - 14" West a distance of 12.19 ft. to a point of curve;
Thence; Southwesterly and to the right along said curve with a radius being 112.36 ft. and length of 46.41 ft. to a point of tangent;
Thence; South 34° - 46' - 09" West a distance of 194.37 ft. to a point of curve;
Thence; South and to the left along said curve with a radius being 150.00 ft. and length of 89.36 ft. to a point of tangent;
Thence; South 00° - 38' - 43" West a distance of 188.98 ft. to a point of curve;
Thence; Southwesterly and to the right along said curve with a radius being 150.00 ft. and length of 116.75 ft. to a point of tangent;
Thence; South 45° - 14' - 22" West a distance of 152.25 ft. to a point of curve;
Thence; Southwesterly and to the right along said curve with a radius being 290.00 ft. and length of 96.34 ft. to a point of tangent at which point said easement becomes 60.00 ft. in width;
Thence; South 64° - 16' - 24" West a distance of 94.42 ft. to the Terminus of said easement centerline

2. **INITIAL CONSTRUCTION.** The initial construction of said easement road shall be performed by or under the supervision of FRIENDS' expense. Said road shall be constructed according to Thurston County standard road specifications for private gravel access roads. FRIEND shall obtain and comply with all necessary government permits for the construction of said road and FRIEND shall be responsible for the clean-up of any construction debris.

3. **BASIC MAINTENANCE TERMS.** The parties hereto agree that the roadway described hereinabove shall be maintained in perpetuity within the described easement boundary or such boundaries as may be agreed to hereinafter by all parties. The surface of the roadway shall be maintained as to, and free

MICROFILMED

1991
File No 910920095
VOL. 1262 PAGE 227

and reasonable passage of such vehicular traffic as may be reasonable and necessary in order that all parties may enjoy full and unrestricted use of the parcels of real property described hereinabove.

4. PROBATION OF MAINTENANCE COSTS. The cost of maintaining the roadway described hereinabove in the manner set forth in paragraph 3 herein, shall be born in equal shares by the ownership of each parcel of real property served by said access roadway.

5. ORDER FOR WORK PROCEDURE. In the event that the ownership of a parcel of real property affected hereby shall desire to have maintenance work done on the roadway at common expense, said owners shall circulate a written notice by certified mail, explaining the nature of work desired and the expected cost thereof among the ownership of the affected parcels. If, after the expiration of ten (10) days from the date of receipt of said notice by all property owners affected, no objection to such work has been received by the initiator of the notice, such work may be ordered and payment for such work shall be made in accordance with paragraph 4 above.

6. EXTRAORDINARY USE COST. In the event that the ownership of properties affected hereby should by their use of the roadway cause it to be subjected to other than reasonable wear and tear and should such roadway be damaged by such use, the individual subjecting the road to such extraordinary use shall have the obligation to repair such damage upon demand by any property owner affected hereby to restore said roadway to the condition consisting prior to such usage and all such expenses therefor shall be born by such individuals or individual.

7. BENEFIT OF COVENANT. The rights and obligations set forth herein shall inure to and be binding upon the heirs, successors or assigns of the parties hereto and shall constitute a covenant running with the parcels of real estate affected hereby.

IN WITNESS WHEREOF, the parties hereto have executed this Easement-Agreement on the day and year first hereinabove written


JOHN FRIEND - President
FRIEND & FRIEND ENTERPRISES, INC.

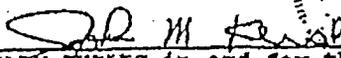
Real Estate Sales Tax Paid 0.00
No. None Date 7-6-91
County, Thurston Co, Treas
Michael Deputy

THURSTON COUNTY
OLYMPIA, WA
09/03/91 1:24 PM
REQUEST OF WASHINGTON, R
Sam S. Reed, AUDITOR
BY: MIKE, DEPUTY

Vol: 1858 Page: 588
File No: 9109200055

STATE OF WASHINGTON }
County of Thurston } ss.

ON THIS 15th day of JULY, 1991, personally appeared before me, a Notary Public, JOHN FRIEND, to me known to be the individual described herein, who acknowledged to me that he has read the foregoing Road Easement and Maintenance Agreement, that he knows the contents thereof and believe the same to be true and correct and sign the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

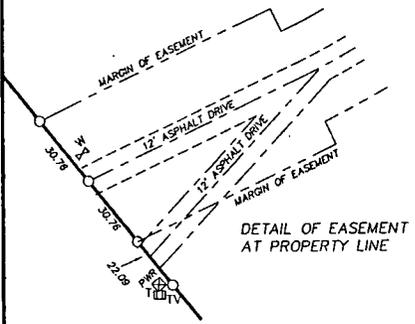
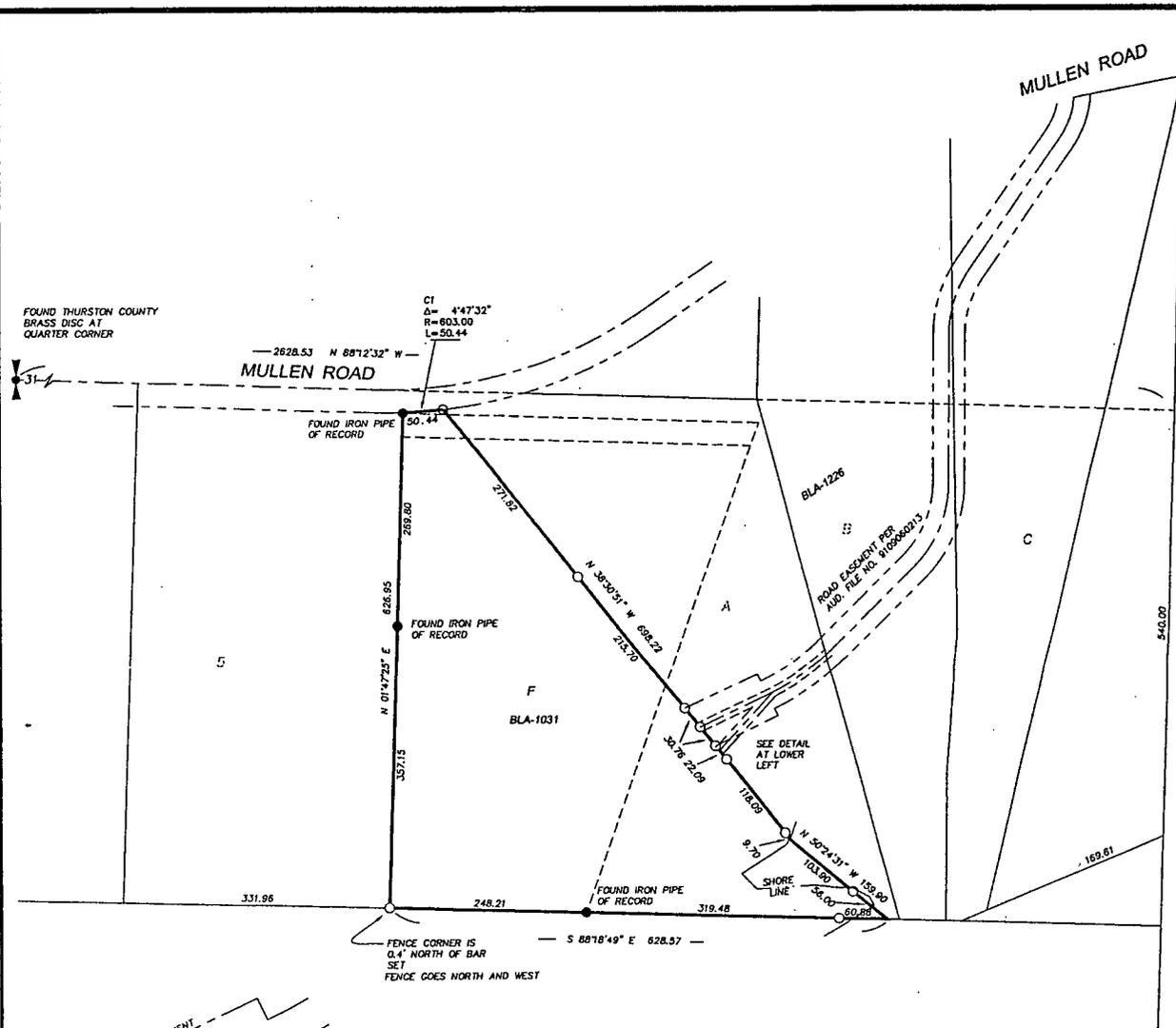

NOTARY PUBLIC in and for the State of
Washington, residing at ABERDEEN

MICROFILMED

Vol: 1857 Page: 120
File No: 9109030087

APPENDIX B

Survey of Property (Trial Exhibit 18)



LEGAL DESCRIPTION

PARCEL F OF BOUNDARY LINE ADJUSTMENT NO. 1031 AS RECORDED UNDER AUDITOR'S FILE NO. 9102270153, RECORDS OF THURSTON COUNTY WASHINGTON.

BRACY & THOMAS
 LAND SURVEYORS
 A PROFESSIONAL SERVICES CORPORATION
 1115 BLACK LAKE BOULEVARD S.W.
 OLYMPIA, WASHINGTON 98502
 (360)337-5593
 FAX (360)357-5594

CERTIFICATE OF SURVEYOR

THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT AT THE REQUEST OF ROSS McWALD IN JANUARY, 2005.

DATE: _____
 REGISTERED PROFESSIONAL LAND SURVEYOR
 CERTIFICATE NUMBER L.S. 33138

CERTIFICATE OF AUDITOR

FILED FOR RECORD THIS ____ DAY OF _____, 20 __, AT ____ MINUTES PAST ____ O'CLOCK ____ M., AND RECORDED UNDER AUDITOR'S FILE NUMBER _____, AT THE REQUEST OF BRACY AND THOMAS.

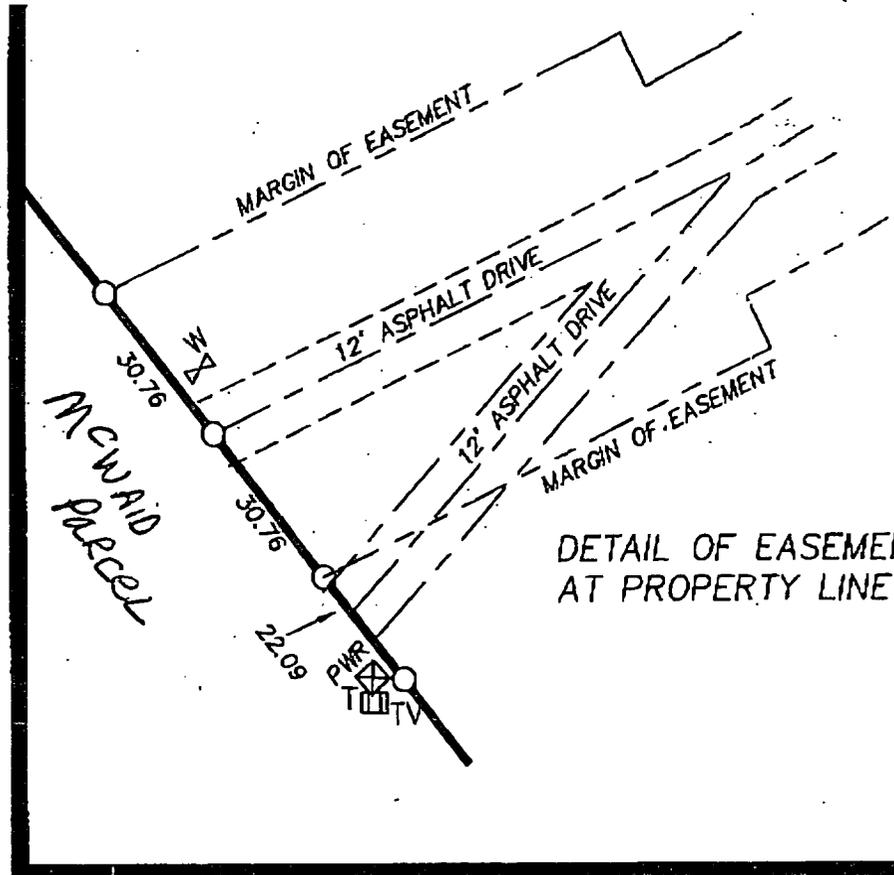
____ BY _____
 THURSTON COUNTY AUDITOR DEPUTY

AUDITOR'S INDEXING DATA

NE 1/4 OF THE SW 1/4	SECTION 31	TOWNSHIP 18 NORTH	RANGE 1 EAST W.M.
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APPENDIX C

**Blow Up of Survey Showing Lower End
of Fork of Roadway
(Trial Exhibit 18)**

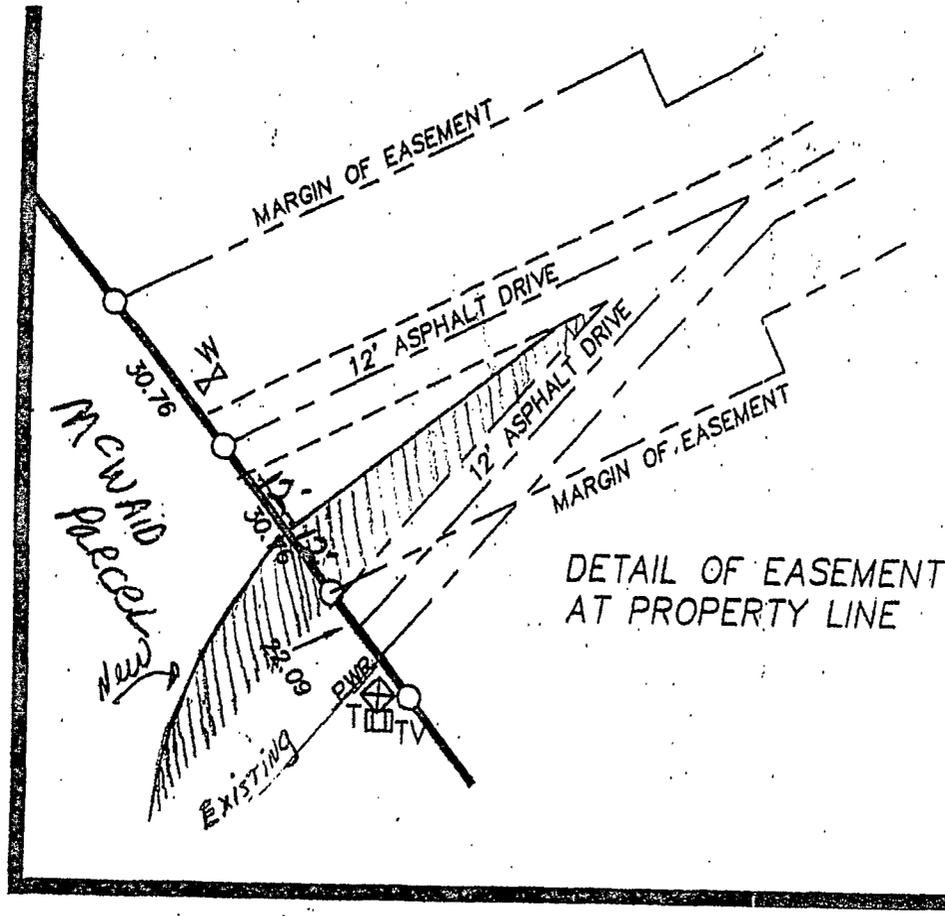


McWaid Parcel

DETAIL OF EASEMENT AT PROPERTY LINE

APPENDIX D

**Diagram Showing Approximate Location
of Additional Travelling Surface Created
by McWaid
(CP 351)**



DETAIL OF EASEMENT
AT PROPERTY LINE

APPENDIX E

**Letter from Dhanens to McWaids
Granting Permission to Construct and
Utilize Additional Travelling Surface
(Trial Exhibit 22)**

July 8, 2005

Ross and Kathleen McWaid
9739 Mullen Rd SE
Olympia, WA 98513

cc: Jack Hanemann

Ross and Kathleen,

Enclosed please find check #5526 for \$330.00, which covers half of the cost of the 205 Diamond 3 Way blocks used in the construction of the retaining wall on our property. This check is being sent subsequent to the agreement (which was sealed with a handshake) reached by Vince and Ross on Saturday June 25th, 2005. The choice to allow the retaining wall was reached because, as stated on numerous occasions, it was never our intention to keep you from using the lower drive. The widening of the road was unnecessary, but as long as it is done in a safe and aesthetically pleasing manner, we will consent to it. We do expect you to finish the job with gravel as you stated you would when we reached the agreement. We also reserve the right to change the appearance of the wall in the area that falls on our property should we choose to do so in the future.

Our original concerns however do still exist. These concerns have to do with what we consider disrespect for our property rights, and liberties that have been taken but are not granted in the easement. The easement does not give you permission to do whatever you want, whenever you want.

We request that you please remain on the blacktop surfaces as driving off the blacktop breaks down the edges of the asphalt and creates cracks in the driveway. It also leaves unsightly tire tracks and causes torn up, muddy areas.

If you wish to change or remove vegetation in the easement area, please consult us first and we will try to accommodate your wishes with something mutually agreed upon. You are not to make any changes on your own.

Excessive speed is still an issue. In previous communications you agreed to a 20 mph speed limit. Please honor your commitment and communicate the limit to your guests.

I hope the days of dispute are over and this neighborhood can once again become a comfortable place to live.

Very truly yours,



Susan Dhanens

APPENDIX F

Findings of Fact and Conclusions of Law (CP 200-255)

1 4. The Dhanens also presently own certain real property legally described as
2 Parcel A of Boundary Line Adjustment No. BLA-1226, as recorded July 2, 1992 under Auditor's
3 File No. 9207020300 in Volume 12 of Boundary Line Adjustment, pages 316 through 320,
4 inclusive, in Thurston County, Washington (hereinafter, the "Spridgen Property").

5 5. The Dhanen Property abuts Lake St. Clair.

6 6. The Spridgen Property also abuts Lake St. Clair. It is located to the south of the
7 Dhanen Property and to the north of the McWaid Property, and also abuts each of them.

8 7. In 1991, Friend & Friend Enterprises, Inc., the president of which was John
9 Friend (hereinafter, "Friend"), owned the McWaid Property, the Dhanen Property, the Spridgen
10 Property, and certain additional property.

11 8. In the spring and summer of 1991, in anticipation of subdividing, improving, and
12 selling its property, Friend constructed a rough, unpaved road surface which extended from
13 Mullen Road across the Dhanen and Spridgen properties to and into what became the McWaid
14 Property. Friend used this road to log, among other areas, portions of both the Lakeside and
15 Building Site areas of the McWaid Property. As described in Mr. Kaufman's testimony, Friend
16 cleared a landing site on the lower level of the McWaid Property in connection with this logging.

17 9. During this time, Larry Kaufman, then associated with Kaufman Brothers
18 Construction, a well known and reputable local construction contractor, began talking to Friend
19 about purchasing the McWaid Property.

20 10. Mr. Kaufman advised Friend that he was interested in purchasing the McWaid
21 Property only if Friend provided vehicular access to each of the flat areas on the property,
22 including the Lakeside area and the Building Site area.

23 11. In response, Friend graded the side of the steep hill between the Lakeside area and
24 the Building Site area on the McWaid Property so as to create an unpaved road surface leading to
25 a cleared landing area on the Lakeside area of the McWaid Property. Friend also constructed the
26 rough, unpaved roadway that led to the Building Site area of the McWaid Property. Both of
27

1 these roads began at a fork located approximately 80 or 90 feet from the McWaid Property on
2 the Spridgen Property.

3 12. In anticipation of subdividing and selling the property which Friend owned,
4 Friend recorded, as part of a set of restrictive covenants, a Road Easement and Maintenance
5 Agreement (hereinafter, the "Road Easement"). The Road Easement is dated July 18, 1991, and
6 was recorded on September 20, 1991 as part of Thurston County Auditor's File No. 9109200095.

7 13. The Road Easement creates an easement running from Mullen Road to the
8 McWaid Property that is 40 feet wide for most of its length. However, as it approaches the
9 McWaid Property, it widens to 60 feet at a point 94.42 feet from the McWaid Property. The area
10 legally described in the Road Easement is hereinafter referred to as the "Road Easement Area."

11 14. Paragraph 1 of the Road Easement provides for "a perpetual, non-exclusive
12 easement for the construction, maintenance, use, and operation of a road for ingress, egress, and
13 utility purposes to serve the property described hereinabove..." Paragraph 2 of the Road
14 Easement obligated Friend to perform the "initial construction of the easement road at its
15 expense." Paragraph 3 of the Road Easement states "The surface of the roadway shall be
16 maintained as to allow free and reasonable passage of such vehicular traffic as may be
17 reasonable and necessary in order that all parties may enjoy full and unrestricted use of the
18 parcels of real property served by said access roadway."

19 15. Friend's interest in recording the Road Easement was to provide ready access to
20 all portions of the properties he was planning to sell in order to maximize the price at which each
21 of the properties would sell.

22 16. Friend provided for the Road Easement Area to widen to 60 feet at a point 94.42
23 feet from the McWaid Property in order to accommodate the forking of the roadway, so as to
24 provide Mr. Kaufman and his successors in interest with vehicular access to both the Lakefront
25 and Building Site areas of the McWaid Property.

26
27
OWENS DAVIES FRISTOE
TAYLOR & SCHULTZ, P.S.
1115 West Bay Drive, Suite 302
Olympia, Washington 98502
Phone: (360) 943-8320
Facsimile: (360) 943-6150

1 17. Mr. Kaufman would not have purchased the McWaid Property from Friend if
2 Mr. Kaufman had not understood he was being provided vehicular access to both the Lakeside
3 and Building Site areas on the McWaid Property.

4 18. In September 1991, Friend sold the McWaid Property to Larry Kaufman for a
5 consideration of \$92,000.00. This price is consistent only with a lot having meaningful
6 waterfront access. The Real Estate Contract reflecting this sale was recorded on September 20th,
7 1991 under Thurston County Auditor's File No. 9109200096.

8 19. Some time in the spring or summer of 1992, but prior to July 31, 1992, Friend,
9 acting to fulfill the obligation imposed on it under the Road Easement to perform the initial
10 construction of a roadway, actually constructed the asphalt roadway.

11 20. Prior to constructing the asphalt roadway, Friend installed utility lines along the
12 lakefront side of the lower fork of the roadway. These utility lines terminate at a utility box
13 located on the McWaid Property, just past the lakefront end of the lower fork of the asphalt
14 roadway.

15 21. Friend did not actually have the boundary of the Road Easement surveyed or
16 marked on the ground prior to installing the utilities, utility box, or constructing the asphalt
17 roadway.

18 22. The asphalt roadway which Friend actually constructed is approximately 16 feet
19 in width, and is generally located within the Road Easement Area.

20 23. At approximately the point where the Road Easement widens from 40 to 60 feet
21 in width, the asphalt roadway constructed by Friend split into two forks.

22 24. One consists of an asphalt surface, approximately 12 feet in width, centered
23 approximately in the middle of the Roadway Easement, which runs in a straight line from where
24 the roadway forks to the border of the McWaid Property. This fork ends at a point where it
25 continued onto the rough road constructed by Friend to provide access to the upper "Building
26 Site" portion of the McWaid Property.
27

1 25. The second fork consists of an asphalt surface, approximately 12 feet in width that
2 runs in a straight line from the point where the roadway forks in a more easterly direction, to the
3 border of the McWaid Property. This fork ends at a point where it continued on to the rough
4 road constructed by Friend to provide access to the Lakefront portion of the McWaid Property.

5 26. The aerial photograph admitted as Exhibit 6 was taken on July 31, 1992, shortly
6 after Friend had constructed the asphalt roadway. It shows both the paved forks of the easement
7 road with the end of the pavement at the boundary at the McWaid Property clearly visible. It
8 shows unpaved roads extending directly off the paved forks to both the Building Site and
9 Lakefront areas of the McWaid Property. It shows a landing area on the Lakefront area of the
10 McWaid Property, as described by Lawrence Kaufman.

11 27. The aerial photograph labeled "1996 Geodata Aerial Photograph" admitted as part
12 of Exhibit 28 also clearly shows a defined road extending from the end of the paved lower fork
13 into the Lakeside area of the McWaid Property.

14 28. The aerial photograph dated May 31, 2003, admitted as part of Exhibit 28, also
15 shows the road extending from the paved lower fork into the Lakefront area of the McWaid
16 Property.

17 29. A small triangular portion of the lower fork of the asphalt roadway constructed by
18 Friend in fact is located outside the Road Easement Area.

19 30. The fact that a small triangular portion of the lower fork of the roadway surface is
20 located outside the Road Easement Area is not apparent from a visual inspection of the roadway.

21 31. The fact that a small triangular portion of the lower fork of the roadway surface is
22 located outside the Road Easement Area was not known to Larry Kaufman, Andrew Schell, nor
23 to the McWaid until Mr. McWaid had a conversation with Vincent Dhanens in December 2004
24 as described hereinafter.

25 32. After purchasing the McWaid Property, and throughout the entire time during
26 which he owned the McWaid Property, Larry Kaufman, who lived 15 to 20 minutes away,
27 regularly accessed and utilized the McWaid Property, and both forks of the road leading to the

OWENS DAVIES FRISTOE
TAYLOR & SCHULTZ, P.S.
1115 West Bay Drive, Suite 302
Olympia, Washington 98502
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1 McWaid Property, in exactly that matter one would expect an owner of undeveloped lakefront
2 property to access and utilize such property: to camp on it, to fish from it, to access the lake, and
3 to enjoy the view from the property.

4 33. When accessing and using the McWaid Property, Mr. Kaufman did nothing to
5 hide or conceal his accessing of or use of the McWaid Property. His access of and use of the
6 property was capable of being observed by his neighbors.

7 34. Mr. Kaufman accessed and used the property, including the lower fork of the
8 roadway leading up to the property, believing and acting as if he had the right to do so, and not
9 having sought or obtained permission from anyone.

10 35. Mr. Kaufman regularly accessed and used the property in the manner described
11 above for the entire period of his ownership of the property.

12 36. The Court finds Mr. Kaufman's testimony regarding his regular use of the
13 McWaid Property and in particular, the Lakefront area on the McWaid Property, to be credible,
14 and accepts that testimony in its entirety.

15 37. After Friend completed the construction of the asphalt roadway surface, Friend
16 began selling other lots affected by the Road Easement to other purchasers.

17 38. Friend sold the Spridgen Property to Michael and Stacia Spridgen by Real Estate
18 Contract recorded on October 21st, 1992 under Thurston County Auditor's File
19 No. 9210210140.

20 39. The Spridgen Property is approximately 3.47 acres in size. The Spridgen
21 Property is relatively flat on the top, but becomes very steep in the lower section south of the
22 easement road running to the McWaid Property. The very steep area between the easement road
23 and the lake shore is a rough trapezoid with an area of approximately ½ acre.

24 40. There is a "driveway" of sorts on the Spridgen Property. This "driveway" is
25 extremely steep. It does not lead to any building site on the Spridgen Property. The road bed is
26 within the hazardous slope area. The road bed roughly parallels the paved lower fork, climbing
27

1 up towards it and converging until it turns sharply right and intersects the paved lower fork in a
2 right angle, just before the end of the pavement.

3 41. This "driveway" has not historically been used, and as a practical matter could not
4 be used, to serve a residence on the lower section of the Spridgen Property.

5 42. The Spridgens purchased Lot E from Friend within several days of first viewing
6 the property. The Spridgens then left for Germany, from where they did not return until June of
7 1993. During this short period before they left, Mr. Spridgen met Mr. Friend once at the
8 property to look at the property. On this visit with Friend, Mr. Spridgen recalled discussing the
9 transformer and pedestal which Friend had installed on the McWaid Property at the end of the
10 lower fork of the paved road, and testified that he recalled being told that the transformer and
11 pedestal would serve the Spridgen Property.

12 43. In June 1993, the Spridgens returned from Germany and began to live in this area.
13 They lived in this area for approximately two years.

14 44. After the Spridgens returned from Germany, they began to contemplate building
15 in the very steep, lower lake front part of the Spridgen Property.

16 45. In March 1994, in connection with his plans to build, the Spridgens had Friend
17 complete and provide them with the topographical survey. The survey shows the utility pedestal
18 and transformer on the McWaid Property well east of the eastern edge of the easement, and east
19 of where the paved lower fork would be.

20 46. In 1995, Mr. Spridgen began working on plans for construction of a house on the
21 Spridgen Property with Mr. Friend. He obtained a septic plan from Hunter and Associates dated
22 May 8, 1995.

23 47. In Mr. Spridgen's visit to his lot with Mr. Friend in 1995, Mr. Friend identified
24 the lower fork as the point of access to his lot. Interestingly, Mr. Spridgen testified about his
25 conversation with Mr. Friend as follows:

26 And other than that, the other road that we walked down, which I'll call a
27 driveway, because that's what it was identified to me as, would be the
driveway down that lot. It would be my driveway if I decided to -
because I was talking to him about building down there, and he was the

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Olympia, Washington 98502
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Facsimile: (360) 943-6150

1 builder. So I kind of wanted to find out what his expectations were, being
2 able to build a house down there. And he was pretty positive about it. He
said I wouldn't have any problem building a house there.

3 48. Mr. Spridgen testified about a plan to have Friend change the configuration of the
4 driveway. He testified as follows:

5 And we talked about taking this part of the road out from the back—back
6 here somewhere and lowering it so that I could make a ... steep driveway
7 for myself in this area. I was going to take this down around five feet, I
8 think, but I'm not sure if he suggested that or if the fellow that had drawn
9 up the house plans. Because we had a lot of discussions about the
10 elevations through here. And so, this was going to make the driveway less
steep and so that I could get around here. And so we were talking about
taking all this asphalt out, this whole piece out here, and build back up
here—I don't know—maybe 25 feet, I will say, maybe 30 feet, and take
this out and lower this down.

11 49. Later in his testimony, Mr. Spridgen made clear that he was talking about 25 to 30
12 feet back from the point where the fork begins.

13 50. Mr. Spridgen was ready to begin work in June, 1995, but Mrs. Spridgen returned
14 to active duty, and they very quickly moved to Washington D.C. This caused the Spridgens to
15 abandon their construction plans.

16 51. The evidence did not make it entirely clear where the Spridgens lived after living
17 in Washington D.C.. In 2000 and thereafter, Mr. Spridgen split time between Seattle and North
18 Carolina. He was not living in this area. The Spridgens signed the papers selling the property to
19 the Dhanens in 2003 while they were in Virginia. It is clear that Mr. Spridgen only talked to
20 Friend only one time after moving from the area in 1995, to confront Friend about the
21 construction of a water tower on the upper portion of his lot.

22 52. On July 1, 1999, a County official inspected the Spridgen Property and
23 determined that a proposed building site located within the portion of the Spridgen Property on
24 the Lakefront side of the access road was at the top and bottom of a hazardous slope—i.e., a
25 slope greater than 50 percent. The County official determined that there was no building site
26 located in the trapezoidal area on the Spridgen Property between the roadway and the lake front.
27 In order to obtain approval for a building site in this area, the County official stated that the

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TAYLOR & SCHULTZ, P.S.
1115 West Bay Drive, Suite 302
Olympia, Washington 98502
Phone: (360) 943-8320
Facsimile: (360) 943-6150

1 Spridgens would first need to apply for and obtain a critical areas variance. In order to obtain
2 such a variance, the Spridgens would have to show that there was no other building site on the
3 Spridgen Property. The Spridgens could not show this because there is ample room for a
4 building site above or to the north of the easement road on the Spridgen Property. Thus, there
5 simply is no building site on the steep lake front portion of the Spridgen Property.

6 53. Mr. Spridgen's testimony, to the extent that it suggests that Friend somehow
7 moved the location of the road, is not consistent with the photographic evidence. The 1992
8 aerial photo admitted as Exhibit 6, and the 1996 aerial photo admitted as part of Exhibit 28, is the
9 photos closest in time to the events Mr. Spridgen described in his testimony. The photos both
10 show the same road extending off the end of the paved surface of the lower fork of the roadway
11 into the Lakefront portion the McWaid Property.

12 54. Mr. Spridgen's testimony is not consistent with this photographic evidence, and
13 otherwise is not credible.

14 55. In October 1997, Vincent and Susan Dhanens purchased the Dhanen Property.

15 56. In September 2000, Larry Kaufman sold the McWaid Property to Andrew Schell
16 for a consideration of \$100,000.00. This sale price is consistent only with a parcel affording
17 meaningful waterfront access. This sale is reflected by a Statutory Warranty Deed recorded
18 September 29th, 2000 under Thurston County Auditor's File No. 3316487.

19 57. Exhibit 12 is a septic design, dated August 4, 2000, and submitted to Thurston
20 County on August 7, 2000, prepared by Dick Yunker of Hunter and Associates for Mr. Kaufman
21 depicting a proposed septic system on Lot F. Mr. Yunker had been working in the immediate
22 area of Lot E in both 1995 and 1999 before preparing the work for Mr. Kaufman on the McWaid
23 Property in 2000, so he was familiar with the area. Page 2 of the septic design contains a site
24 map from a survey with features drawn in showing a defined road and landing in the form of a
25 cul-de-sac on the Lakefront portion of the McWaid Property.

26 58. After purchasing the McWaid Property, Andrew Schell and his family also
27 regularly accessed and used the McWaid Property, and both forks of the road leading to the

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1 McWaid Property, in exactly that manner one would expect an owner of undeveloped lakefront
2 property to access and utilize such property: to camp on it, to access the lake, and to enjoy the
3 view from the property.

4 59. When accessing and using the property, Mr. Schell did nothing to hide or conceal
5 his accessing of or use of the property, or of the lower fork of the roadway leading to the
6 property. His access and use of the property was capable of being observed by his neighbors.

7 60. Mr. Schell accessed and used the McWaid Property, including both forks of the
8 roadway leading up to the McWaid Property, believing and acting as if he had the right to do so,
9 and not having sought or obtained permission from anyone.

10 61. Mr. Schell regularly accessed and used the McWaid Property in the manner
11 described above for the entire period of his ownership of the property.

12 62. The Court finds Mr. Schell's testimony regarding his regular use of the McWaid
13 Property, and in particular the Lakefront area on the McWaid Property, to be credible, and
14 accepts that testimony in its entirety.

15 63. The relevant period of time for the purposes of establishing a prescriptive
16 easement is September 20, 1991, the beginning of Mr. Kaufman's ownership, through
17 September 20, 2001, a little over a year after Mr. Schell acquired ownership.

18 64. During this entire ten year period of time during which the use occurred
19 establishing a prescriptive easement over the Spridgen Property, the Spridgen Property was
20 owned by Michael and Stacia Spridgen.

21 65. In their case in chief, the Dhanens attempted to rebut Mr. Kaufman's and
22 Mr. Schell's testimony about their regular use of the lower fork of the roadway on the Spridgen
23 Property to obtain access to the Lakeside portion of the McWaid Property. The evidence which
24 the Dhanens presented was not persuasive.

25 66. Mr. Spridgen was mostly absent, never lived on the property, and was seldom
26 there. Therefore, the Court finds his testimony suggesting the use testified to by Mr. Kaufman
27 and Mr. Schell did not occur was not credible.

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1 67. Mr. and Mrs. Dhanens themselves lived on the lot adjacent to the Spridgen
2 Property for a good portion of the prescriptive claim period. However, they lived in a house
3 located well below the easement road. The Dhanens could not observe the McWaid Property
4 from the location of their home. The Court therefore finds their testimony in this respect is also
5 not credible.

6 68. Finally, the Dhanens offered the testimony of another neighbor, Mr. Johnson.
7 Mr. Johnson's testimony can fairly be described as confused. He denied the existence of several
8 obvious features on the McWaid Property that are shown in the photographs. Mr. Johnson
9 seemed to confuse access and cleared area on the lower part of the McWaid Property with access
10 to water and clearing at the water. Therefore, the Court found his testimony not credible.

11 69. After the Spridgens moved to Washington D.C., the Spridgens listed the Spridgen
12 Property for sale on and off until they ultimately sold it to the Dhanens.

13 70. In 2003, Michael and Stacia Spridgen sold the Spridgen Property to Vincent and
14 Susan Dhanens. This sale is reflected by a Statutory Warranty Deed recorded on June 25th,
15 2003, under Thurston County Auditor's File No. 3545305.

16 71. In 2004, Andrew Schell sold the McWaid Property to Ross and Kathleen McWaid
17 for a consideration of \$165,000.00. This sale price is consistent only with a lot which had
18 meaningful waterfront access. The Statutory Warranty Deed reflecting this sale was recorded on
19 June 11th, 2004, under Thurston County Auditor's File No. 3649017.

20 72. Shortly after acquiring the property from Andrew Schell, the McWaids began
21 constructing a residence on the Building Site portion of the McWaid Property. Vincent Dhanens
22 routinely visited the McWaid property to observe the construction activity.

23 73. The McWaids and their contractors regularly used both the upper and lower fork
24 of the roadway to access the McWaid Property to construct the home.

25 74. In early December 2004, about five or six months after the McWaids had begun
26 constructing the home, Vincent Dhanens approached Ross McWaid. They had a discussion
27

1 which addressed the parties' respective rights in the roadway which ran over the Dhanen
2 Property to the McWaid Property.

3 75. During this discussion, Mr. Dhanens told Mr. McWaid that a portion of the lower
4 fork of the asphalt roadway located on the Spridgen Property lay outside the Road Easement
5 Area. Mr. Dhanens told Mr. McWaid that this meant that the McWaid's did not have the right to
6 use that portion of the lower fork of the roadway, only. The Dhanens did not object to the
7 McWaid's continuing to use any portion of the roadway lying within the Road Easement Area.

8 76. This was the first time that the Dhanens had informed the McWaid's, or any of
9 their predecessors in interest, of their claim that the owners of the McWaid Property were not
10 entitled to utilize the entire asphalt surface of the lower fork of the roadway to access the
11 Lakefront portion of the McWaid Property.

12 77. Mr. McWaid responded to Mr. Dhanens by expressing disbelief that any portion
13 of the asphalt roadway was located outside of the Road Easement Area. Mr. McWaid further
14 suggested that, even if this were true, the McWaid's probably had the right to make use of the
15 entire asphalt roadway because it had been in place, and regularly used by the McWaid's and
16 their predecessors, for many years.

17 78. In December 2004, the Dhanens had their attorney send the McWaid's a letter
18 reiterating their claim that a portion of the lower fork of the asphalt roadway lay outside the
19 Road Easement Area. In this letter, the Dhanens, through counsel, stated "You are entitled to
20 travel over Dhanens land on the existing road within the described easement." The Dhanens
21 continued to object to the McWaid's use of that portion of the roadway lying outside the Road
22 Easement Area, only.

23 79. In response, the McWaid's hired a surveyor to perform a survey to determine the
24 exact location of the Road Easement Area. The survey confirmed that a small triangular portion
25 of the roadway in fact did lie outside the Road Easement Area.

26 80. Not wishing their access to the Lakefront portion of their property to be subject to
27 the permission of the Dhanens—inasmuch as that permission could be withdrawn at any time--

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1 the McWaid's formed a plan to excavate the hillside separating the two forks of the roadway so as
2 to create an additional flat surface located within the Road Easement Area on which they could
3 travel to and access the Lakefront portion of the McWaid Property. When utilized together with
4 that portion of the lower fork of the asphalt roadway lying within the Road Easement Area, this
5 would permit the McWaid's to travel to the Lakefront portion of the McWaid Property utilizing a
6 travelling surface located entirely within the Road Easement Area.

7 81. In April 2005, the McWaid's began to remove dirt from the hillside lying between
8 the two forks at the roadway. Vincent Dhanens, asserting the McWaid's first needed to obtain a
9 permit from Thurston County, physically prevented the McWaid's from proceeding.

10 82. The McWaid's did not agree that the amount of dirt they planned to remove was of
11 sufficient volume to obligate them to obtain a permit from Thurston County. However, in order
12 to avoid dispute, the McWaid's applied for, and obtained, a permit from Thurston County.

13 83. In June 2005, armed with the permit, the McWaid's again began to remove dirt
14 from the hillside. Mr. Dhanens again physically prevented the McWaid's from proceeding with
15 the work.

16 84. The McWaid's and the Dhanens then had a discussion, during the course of which
17 Mr. McWaid described with specificity the work he was proposing to complete, and the use to
18 which the McWaid's planned to put the flat graveled surface that would be created.

19 85. At the conclusion of this discussion, the Dhanens consented to the McWaid's
20 completion of the work, and to the McWaid's subsequent use of the travelling surface created
21 thereby.

22 86. In addition to consenting, the Dhanens agreed to contribute \$330 towards the cost
23 the McWaid's were incurring in the performance of the work, which sum was intended to
24 represent one-half the cost of the materials that would be used to construct that portion of the
25 retaining wall located on the Dhanens property.

26 87. At no point during the course of this discussion did the Dhanens state or suggest
27 that the consent that they had granted to the McWaid's' completion of the work and use of the

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1 travelling surface that would be created as a result of the completion of the work was or would
2 be revocable.

3 88. Acting in reliance on the Dhanens' consent, the McWaids completed the work.
4 They removed a small portion of the hillside, constructed a retaining wall, and graveled the flat
5 surface thereby created.

6 89. By letter dated July 8th, 2005, a copy of which they sent to their attorney, the
7 Dhanens followed up on and memorialized the agreement that they had reached with the
8 McWaids.

9 90. In this letter, the Dhanens stated that they never intended to prevent the McWaids
10 from using the lower fork of the roadway, confirmed the consent they granted to the McWaids
11 for the completion of the work, and then stated two specific conditions to which the consent they
12 were granting was subject. Nothing in this letter suggested that the consent that the Dhanens had
13 granted would be revocable for any reason other than non-compliance with the two expressly
14 stated conditions.

15 91. Had the Dhanens intended their consent to be conditioned on anything other than
16 the two conditions expressly stated in the letter, the Dhanens would have said so in this letter.

17 92. The McWaids soon thereafter constructed a gate at their property line, one side of
18 which was located at the retaining wall they had constructed, and the other side of which was
19 located at the extreme northeasterly point of the Road Easement Area.

20 93. After constructing this gate, the McWaids used the area located between the
21 gateposts, and hence located within the Road Easement Area, to access the Lakefront area of the
22 McWaid Property.

23 94. In 2009, the Dhanens, for the first time, asserted that the McWaids were not
24 entitled to use any portion of the lower fork of the roadway to access the McWaid Property.

25 95. In June 2010, based on their newly asserted claim that the McWaids were not
26 entitled to use any portion of the lower fork of the roadway, the Dhanens physically blocked the
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1 roadway, preventing the McWaid's from accessing the Lakefront portion of the McWaid
2 Property.

3 96. In response, the McWaid's filed this lawsuit.

4 97. The McWaid's sought, and obtained, a preliminary injunction enjoining the
5 Dhanens from "blocking or interfering with the McWaid's' use of and access over any portion of
6 the" Road Easement Area.

7 98. As a condition imposed by the Court to obtaining that Preliminary Injunction, the
8 McWaid's filed a bond, Travelers Bond No. 105473963, in order to provide security for any
9 damage that might have been caused by the issuance of the Preliminary Injunction.

10 99. Any finding of fact more properly described as a conclusion of law is hereby
11 adopted as such.

12 II. CONCLUSIONS OF LAW

13 Based the foregoing findings of fact, the Court hereby adopts the following conclusions
14 of law:

15 1. This Court has subject matter jurisdiction over this action and personal
16 jurisdiction over each of the parties hereto. Venue lies with this Court.

17 CONSTRUCTION OF ROAD EASEMENT

18 2. In construing the 1991 Road Easement and Maintenance Agreement, the Court
19 should look to the following: the easement language, the intentions of the parties connected with
20 the original easement, the circumstances surrounding the easement's execution, and the manner
21 in which the easement has been used.

22 3. The Road Easement specifically provides that its purpose is to allow the parties
23 benefitted by it to "enjoy full and unrestricted use of the parcels of real property" served thereby.

24 4. Because of the steep slope that exists between the flat areas of the flat Building
25 Site and Lakefront areas of the McWaid Property, it would be very difficult for a prospective
26 purchaser of the McWaid Property to access the Lakefront portion of the property utilizing just
27 the McWaid Property.

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1 5. It was therefore natural for Mr. Kaufman to have requested, and for Friend to
2 have wished to provide, access to the Lakefront portion of the McWaid Property from the Road
3 Easement Area. The provision of such access would substantially increase the utility and
4 desirability of the McWaid Property, enhancing the price at which it could be expected to sell,
5 while at the same time providing the owner of the McWaid Property with meaningful vehicular
6 access to the Lakeside area of the property, allowing meaningful access to the waterfront.

7 6. Friend in fact constructed an asphalt roadway that forked, with the forks leading
8 to rough roads onto the Lakefront and Building Site areas of the McWaid Property in exactly the
9 manner the topography would suggest, just as requested by Mr. Kaufman.

10 7. The Road Easement and the Real Estate Contract by which Friend sold the
11 McWaid Property to Mr. Kaufman were both recorded on the same day, as part of one
12 transaction.

13 8. The Road Easement Area, which is 40 feet wide for most of its length as it runs
14 from Mullen Road toward the McWaid Property, widens to 60 feet at a point 94.42 feet from the
15 McWaid Property. The Road Easement Area widens in this manner because Friend intended the
16 Road Easement Area to encompass both forks of the asphalt roadway he planned to construct.
17 There is no other reasonable explanation for the widening.

18 9. The Road Easement provides for a "perpetual, non-exclusive easement for the
19 construction, maintenance, use, and operation of a road for ingress, egress, and utility purposes
20 that serve the property described herein above..., including the McWaid Property." It states that
21 the roadway being constructed is intended to "allow free and reasonable passage of such
22 vehicular traffic as may be reasonable and necessary in order that all parties may enjoy full and
23 unrestricted use of the parcels of real property served by said access roadway." This language
24 does not restrict the use of the roadway to the McWaid property to a single point of entry.

25 10. As required by the Road Easement, Friend constructed an asphalt surface roadway
26 by no later than July 1992, before Friend sold any of the other lots to other purchasers.

27

1 Spridgen Property, and of such a nature as would charge a reasonable person in the owners'
2 position with notice of the use.

3 18. The use was "continuous and uninterrupted." The use was "continuous and
4 uninterrupted" because the use was of the same character that a true easement holder would
5 make of an easement over the area in question.

6 19. The use was "hostile and adverse." It was "hostile and adverse" because Larry
7 Kaufman and Andrew Schell each utilized the entire asphalt roadway surface believing and
8 acting as though they had a right to do so, and seeking permission from no one.

9 20. Finally, the use of the property in the manner described above occurred for a ten
10 year period, beginning on September 20, 1991, with Larry Kaufman's acquisition of the
11 property, and continuing on to and through September 20, 2001, during the Schells' ownership.

12 21. The McWaid's having presented evidence supporting the above conclusions which
13 the Court finds clear, cogent and convincing, the Court should enter a judgment declaring that
14 the McWaid's possess a prescriptive easement right to continue to utilize the entire existing
15 asphalt roadway surface to access the Lakefront portion of the McWaid Property.

16 USE OF CONSTRUCTED TRAVELLING SURFACE

17 22. The 1991 Road Easement and Maintenance Agreement specifically describes the
18 area which is to be subject to the easement (the "Road Easement Area.").

19 23. The fact that Friend initially constructed the roadway at one location within the
20 Road Easement Area did not fix the Road Easement Area or cause it to contract. The McWaid's
21 are entitled to make reasonable use of the entire Road Easement Area.

22 24. In 2004/2005, the McWaid's learned from the Dhanens, and then verified by
23 survey, that a small triangular portion of the asphalt roadway surface lay outside the Road
24 Easement Area. The McWaid's further learned that the Dhanens objected to the McWaid's use of
25 any portion of the asphalt roadway surface outside of the Road Easement Area.

26 25. In response, the McWaid's decided to construct a travelling surface for accessing
27 the Lakefront that would lie entirely within the Road Easement Area.

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1 26. The McWaids acted reasonably, and within the rights granted to them by the Road
2 Easement, in relocating the travelling surface within the existing easement.

3 27. The McWaids are entitled to continue to use and maintain the graveled surface
4 area they created in 2005 to access the Lakefront portion of the McWaid Property.

5 28. The Dhanens have failed to prove their claims that the McWaids committed waste
6 or trespass in this regard.

7 29. Any conclusion of law that is more accurately characterized as a finding of fact is
8 hereby adopted as such.

9 Based on the foregoing Findings of Fact and Conclusions of Law, the Court declares that
10 it will enter a Judgment:

11 1. Declaring that the McWaids have the right to make reasonable use of the entire
12 Road Easement Area for the purposes enumerated in that document;

13 2. Declaring that the McWaids have a prescriptive easement right to continue to
14 utilize the entire asphalt surface of the lower fork of the roadway to access the Lakefront portion
15 of their property;

16 3. Declaring that the McWaids were, are, and in the future shall be entitled to utilize
17 the Road Easement Area, the asphalt roadway surface as actually constructed by Friend, together
18 with the graveled travelling surface which the McWaids constructed in 2005 within the Road
19 Easement Area for the purposes described in the 1991 Road Easement and Maintenance
20 Agreement, including, but not limited to, the use of these areas for access to the lakefront portion
21 of the McWaid Property. This includes using these areas to travel from the Building Site area of
22 the McWaid Property to the Lakefront area of the McWaid Property, and vice-versa;

23 4. Permanently enjoining the Dhanens, their agents and their guests, and anyone
24 receiving notice of the Court's judgment, from blocking or interfering with the McWaids' use of
25 and access over any portion of the Road Easement Area or the existing asphalt roadway for the
26 purpose of accessing the McWaid Property;

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TAYLOR & SCHULTZ, P.S.
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5. Dismissing the counterclaim alleged by the Dhanens in their answer with prejudice;

6. Declaring that Travelers Bond No. 105473963, filed by the McWaids as security for any damage that might have been caused to the Dhanens by the issuance of the preliminary injunction in this matter, is fully exonerated and released. And,

7. Declaring that the McWaids are the substantially prevailing party, entitled to an award of their statutory attorney's fees and costs.

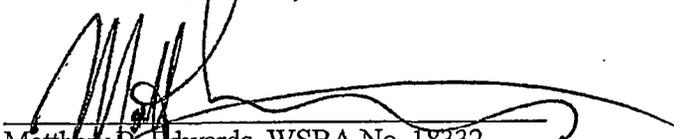
DATED this 23 day of March 2011.


The Honorable Thomas McPhee, Judge

Presented by:

OWENS DAVIES FRISTOE
TAYLOR & SCHULTZ, P.S.

Thomas McPhee


Matthew B. Edwards, WSBA No. 18332
Attorneys for Plaintiffs Ross and Kathleen McWaid

Approved as to Form:

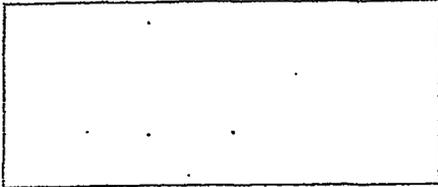
WERTJES LAW GROUP PS


Alan Wertjes, WSBA No. 29994
Attorneys for Defendants Vincent and Susan Dhanens

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2011 OCT -6 PM 4:00

BETTY J. GOULD, CLERK



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SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY	
ROSS and KATHLEEN MCWAID, husband and wife, Plaintiffs,	
v.	
VINCENT A. DHANENS and SUSAN J. DHANENS, husband and wife, and their marital community, Defendants.	

NO. 10-2-01370-6

STIPULATED JOINT EXHIBIT LIST

JUDGE THOMAS MCPHEE
Clerk: Steve Shackley
Court Reporter: Kathy Beehler
Date: October 4 - 6, 2011
Type of Hearing: Civil Bench Trial

COME NOW Plaintiffs Ross and Kathleen McWaid, by and through their attorney, Matthew B. Edwards of Owens Davies Fristoe Taylor & Schultz, P.S., and Defendants Vincent and Susan Dhanens, by and through their attorney, Alan J. Wertjes, and hereby stipulate that the following documents shall be admitted into evidence at trial in this matter.

OFFERED BY	NUMBER OF EXHIBIT	ADMITTED DATE	TITLE OR NAME OF EXHIBIT
Plaintiff	1.	Yes 10-04-11	Boundary Line Adjustment BLA-1031 signed December 11, 1990 and recorded on February 27, 1991, under Auditor's File Number 9102270153.
Plaintiff	2.	Yes 10-04-11	Protective Covenants Applicable to and for Recording Against recorded on September 20, 2011, under Auditor's File Number 9109200095.
Plaintiff	3.	Yes 10-04-11	Road Easement and Maintenance Agreement dated July 18, 1991 and recorded on September 20, 1991, under Auditor's File Number 9109200095.

STIPULATED JOINT EXHIBIT LIST - 1

EXHIBIT A

OFFERED BY	NUMBER OF EXHIBIT	ADMITTED DATE	TITLE OR NAME OF EXHIBIT
Plaintiff	4.	Yes 10-04-11	Real Estate Contract between Lawrence Kaufman and Friend & Friend Enterprises, Inc. regarding Parcel F of BLA-1031 recorded on September 20, 1991 under Auditor's File Number 9109200096.
Plaintiff	5.	Yes 10-04-11	Boundary Line Adjustment BLA-1226 recorded on July 2, 1992, under Auditor's File Number 9207020300.
Plaintiff	6.	Yes 10-04-11	Aerial photograph taken on July 31, 1992 showing the existing asphalt roadway as it was installed.
Plaintiff	7.	Yes 10-04-11	Real Estate Contract between Friend & Friend Enterprises and Michael and Stacia Spridgen dated October 2, 1992, recorded on October 21, 1992, under Auditor's File Number 9210210140.
Plaintiff	8.	Yes 10-04-11	Approved Septic System Design dated May 30, 1995 for Mike Spridgen
Plaintiff	9.	Yes 10-04-11	Statutory Warranty Deed recorded on October 24, 1997, under Thurston county Auditor's File Number 3116544 reflecting the Vincent and Susan Dhanens purchase of that portion of the Dhanen property described as Parcel B of BLA 1226.
Plaintiff	10.	Yes 10-04-11	Septic System Design dated June 21, 1999 for Mike Spridgen
Plaintiff	11.	Yes 10-04-11	Letter dated July 9, 1999, from Lizbeth Morrell at Thurston County to Mike Spridgen regarding conditional site approval.
Plaintiff	12.	Yes 10-04-11	Septic Design submitted to Thurston County on August 7, 2000, by Larry Kaufman.
Plaintiff	13.	Yes 10-04-11	Statutory Warranty Deed reflecting the sale of Parcel F from Larry Kaufman to Andrew Schell recorded on September 29, 2000, under Auditor's File Number 3316487.
Plaintiff	14.	Yes 10-04-11	Statutory Warranty Deed reflecting the sale of Parcel A of BLA 1226 from Michael and Stacia Spridgen to Vincent and Susan Dhanens, dated June 18, 2003, recorded on June 25, 2003, under Auditor's File Number 3545305.
Plaintiff	15.	Yes 10-04-11	Statutory Warranty Deed reflecting the sale of Parcel F from Andrew Schell to Ross and Kathleen McWaid, recorded on June 11, 2004, under Auditor's File Number 3649017.

STIPULATED JOINT EXHIBIT LIST - 2

1	OFFERED BY:	NUMBER OF EXHIBIT	ADMITTED? DATE	TITLE OR NAME OF EXHIBIT
2	Plaintiff	16.	Yes 10-04-11	Letter dated December 30, 2004 from the Dhanens' attorney, Jack Hanemann to Kathleen and Ross McWaid regarding the Road Easement.
3				
4	Plaintiff	17.	Yes 10-04-11	A portion of the Bracy & Thomas Survey Map showing a portion of the asphalt roadway outside the easement area. January 2005.
5				
6	Plaintiff	18.	Yes 10-04-11	Bracy & Thomas January 2005 Oversized Survey Map
7	Plaintiff	19.	Yes 10-04-11	Letter dated January 31, 2005 from Brent Dille to Jack Haneman
8	Plaintiff	20.	Yes 10-04-11	Letter dated February 22, 2005, from the Dhanens' attorney, Jack Hanemann, to Brent Dille regarding a prescriptive easement.
9				
10	Plaintiff	21.	Yes 10-04-11	Thurston County Roads & Transportation Services Grading Permit dated May 20, 2005 for Ross McWaid.
11				
12	Plaintiff	22.	Yes 10-04-11	Letter from Susan Dhanens dated July 8, 2005, to the McWaid's regarding the Dhanens payment for one-half the cost of concrete blocks.
13				
14	Defendant	23.	Yes 10-04-11	Letter dated August 3, 2005 to Vincent and Susan Dhanens from Thurston County Development Services with attachments.
15				
16	Plaintiff	24.	Yes 10-04-11	Friendly Cove Homeowner's Meeting Minutes dated August 24, 2006
17	Plaintiff	25.	Yes 10-04-11	Complaint
18	Plaintiff	26.	Yes 10-04-11	Answer and Affirmative Defenses
19				
20	Plaintiff	27.	Yes 10-04-11	Preliminary Injunction
21	Plaintiff	28.	Yes 10-04-11	Aerial photographs downloaded from the Thurston County GeoData Center and Google Earth.
22				
23	Defendant	29.	Yes 10-04-11	Four Photographs
24	Plaintiff	30.	Yes 10-05-11	Photograph
25	Plaintiff	31.	Yes 10-05-11	Photograph
26	Plaintiff	32.	Yes 10-05-11	Plans
27	Defense	33.	Yes 10-06-11	Photograph:
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STIPULATED JOINT EXHIBIT LIST - 3

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OFFERED BY	NUMBER OF EXHIBIT	ADMITTED DATE	TITLE OR NAME OF EXHIBIT
Defense	34.	Yes 10-06-11	Photograph:
Defense	35.	Yes 10-06-11	Photograph:
Defense	36.	Yes 10-06-11	Photograph:
Defense	37.	Yes 10-06-11	Photograph:
Defense	38.	Yes 10-06-11	Photograph:
Defense	39.	Yes 10-06-11	Photograph:

STIPULATED JOINT EXHIBIT LIST -4

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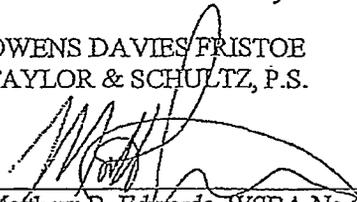
STIPULATION TO EXHIBIT LIST

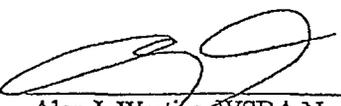
We have examined the exhibits in the above-entitled case and stipulate the exhibits noted as admitted are acceptable for review by the jury/judge.

DATED this 6th day of October 2011

OWENS DAVIES FRISTOE
TAYLOR & SCHULTZ, P.S.

WERTJES LAW GROUP, P.S.


Matthew B. Edwards, WSBA No. 18332
Attorney for Plaintiffs


Alan J. Wertjes, WSBA No. 29994
Attorney for Defendants

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

ROSS and KATHLEEN McWAID,
husband and wife,

Plaintiffs,

vs.

VINCENT A. DHANENS and SUSAN
J. DHANENS, husband and wife,
and their marital community,

Defendants.

No. 10-2-01370-6

ORAL OPINION

BE IT REMEMBERED that on the 14th day of October, 2011,
the above-entitled and numbered cause came on for hearing
before the Honorable Thomas McPhee, Judge, Thurston County
Superior Court, Olympia, Washington.

Kathryn A. Beehler, CCR No. 2448
Certified Realtime Reporter
Thurston County Superior Court
2000 Lakeridge Drive S.W.
Building 2, Room 109
Olympia, WA 98502
(360) 754-4370

EXHIBIT B¹

A P P E A R A N C E S

For the Plaintiffs:

Matthew Bryan Edwards
Attorney at Law
Owens, Davies, Fristoe,
Taylor & Schultz, P.S.
1115 West Bay Drive NW
Olympia, WA 98502-4668
360-943-8320
medwards@owensdavies.com

For the Defendants:

Alan J. Wertjes
Attorney at Law
1800 Cooper Point Rd. SW
Building 3
Olympia, WA 98502
360-570-7488

1 October 14, 2011

Olympia, Washington

2 AFTERNOON SESSION

3 Department 2

Hon. Thomas McPhee, Presiding

4 Kathryn A. Beehler, Official Reporter

5 --oOo--

6 THE COURT: Good afternoon, ladies and
7 gentlemen. Welcome back to court. Counsel and
8 Ms. Dhanens, here is my decision in the case. I'll
9 begin by explaining the findings of fact and
10 conclusions of law that I make and the basis for
11 those findings and conclusions.

12 I begin with the credibility of the witnesses. We
13 heard a number of witnesses in this case. And as a
14 judge sitting in a bench trial, I'm responsible for
15 making determinations about the credibility of the
16 witnesses and the evidence that I hear. There are
17 two factors in credibility. First is the credibility
18 of the witness, which relates to truth telling and
19 the assurance that what I am hearing is, in fact, a
20 truthful statement by the witness.

21 The second type of credibility is the credibility
22 of the evidence itself; what weight, in other words,
23 should be given to the evidence. Is the evidence
24 consistent with other testimony? Is it consistent
25 with physical evidence? What prisms does the

1 evidence pass through as it is related by the
2 witness, even though the witness believes that he or
3 she is giving an accurate account of what was seen,
4 heard, or observed through the senses? What interest
5 does the person who is the witness have in testifying
6 about the evidence that is being presented, and what
7 was the focus of the witness's attention when making
8 those statements?

9 I often use the example of a pickup load of
10 garbage as an example of the credibility of very
11 similar evidence that is also very different. When
12 the pickup passes down the city street and dumps a
13 portion of its garbage on the well tended lawn of the
14 property owner, that property owner may view the dump
15 of garbage with anger and dismay over what has
16 occurred. He or she may see it as a blight on the
17 lawn or garden that is so well kept and tended. And
18 that is the focus. It is not surprising to hear that
19 witness testify that the garbage was a very large
20 pile of garbage creating considerable distress to the
21 property owner.

22 The pickup driver may be concerned about his or
23 her responsibility, and so the focus of that person's
24 description of the same events may tend to minimize
25 that possibility of responsibility by focusing on how

1 small the pile is and what little bother it would be
2 to clean it up.

3 For the bystander who has no interest in the case
4 and observes the events, he or she may be mostly
5 interested in the pickup, wondering how much of his
6 or her budget it would cost to afford such a nice
7 pickup without really noticing the pile of garbage
8 and so may testify that it was nothing special.

9 All of those persons are testifying in an
10 absolutely truthful way, but the differences in their
11 testimony illustrates the differences in the
12 credibility of the evidence and why it is important
13 to understand the evidence and to understand the
14 prism through which it passes as the witness
15 testifies to it.

16 So in judging this evidence, I first find that the
17 witnesses were, for the most part, credible. Even
18 though the evidence that they testified to was very
19 different, I certainly cannot say that one was
20 consciously lying and another was telling the truth.
21 Rather, I suspect it represents the very different
22 viewpoints that each brought to the site of
23 observation in testifying to what he or she saw or
24 the conversation in testifying to what he or she
25 heard. In that regard, I also understand that the

1 events that we are talking about can be as much as 20
2 years ago, and so memories certainly change during
3 that period of time.

4 Having introduced the subject of credibility, I am
5 now going to turn to a physical description of the
6 two properties at issue in this case. Lot F is a lot
7 of approximately 4.5 acres described in the evidence
8 as having three level sites: The upper, the middle
9 where the McWaid's house is currently constructed,
10 and the lower part of Lot F. Separating these level
11 parts are very steep slopes.

12 I won't make specific findings about the slope
13 between the upper and the middle part, because it is
14 not an issue in the case, and I didn't hear extensive
15 testimony about that. But the slopes between the
16 middle and lower portions of Lot F are clearly very
17 steep slopes; and that was described in the evidence;
18 and the site visit that I took to the property
19 certainly confirms that evidence.

20 Aerial photos and photos taken from the ground are
21 all very valuable in understanding the layout of
22 property and even in some instances the relative
23 topography, but they are not accurate for
24 understanding the elevations that actually exist
25 there. Testimony from people who have seen that and

1 site visits are very important.

2 We know that Lot F was logged in early 1991. That
3 testimony comes from Mr. Kaufman, a member of Kaufman
4 Brothers Construction, which was a well known
5 construction company that operated in this area for
6 many years. Mr. Kaufman explained his history in
7 construction. His description of land and
8 improvements and topography is a description that I
9 find not only truthful but accurate.

10 Mr. Kaufman described that during his period of
11 time with the property, from before he purchased it
12 until afterwards, that Mr. Friend had logged two
13 areas on Lot F: The middle building site and the
14 lower level. He described a landing site cleared on
15 the lower level for the logging operation.

16 What Kaufman described and what is evident from
17 the view of the pictures and the logs is a typical
18 gypso logging operation for western Washington where
19 the timber is felled, where the downed trees are
20 limbed and bucked and skidded to a landing. At the
21 landing, the logs are loaded and hauled out over a
22 haul road suitable for trucks.

23 Exhibit 6 is crucial evidence for the condition of
24 Lot F at the time of Kaufman's purchase in
25 September 1991. Exhibit 6 is the aerial photograph

1 dated July 31, 1992. It shows in considerable detail
2 the property as described by Mr. Kaufman. It shows
3 the paved forks of the easement road with the end of
4 pavement clearly described. It shows roads directly
5 extending directly off the paved forks. Crucially,
6 the presence of a landing, as described by
7 Mr. Kaufman, is clearly evident in that photograph,
8 and I would compare that photograph with the 1990
9 photograph in Exhibit No. 28 showing the extent of
10 tree cover in that area. It cannot be disputed that
11 the cleared circular area described variously by
12 witnesses as a cul-de-sac and by Mr. Kaufman as a
13 landing became part of the property between 1990 and
14 the photograph in 1992. This lower area, the landing
15 area, was the area for the boathouse described by
16 Mr. Kaufman in his plans.

17 At the top of Lot D and Lot E are areas devoid of
18 trees but with ground vegetation cover - these are
19 shown in Exhibit 6 - indicating either earlier
20 logging or natural clearing. The open ground there
21 at the top of those lots appears much different than
22 the open areas in the lower and the middle sections
23 of Lot F and the strip south of the easement road on
24 Lot E.

25 The sequence of photos in Exhibit 28 shows the

1 existence of the road to the lower section of Lot F.
2 When viewing aerial photos, it is important to
3 understand the orientation from which the aerial
4 photo was taken. Aerial photos are seldom taken from
5 directly above the site viewed in the photograph but
6 are often off to one side. And for the most part,
7 the aerial photographs in Exhibit 28 were taken
8 either from the north or south of the two areas in
9 question on Lot F. I say that because they often
10 appear different in that respect. Sometimes the
11 features shown in one photograph where the
12 orientation is from the north will be obscured or
13 partly obscured by vegetation growing to the south of
14 that area in photographs where the orientation is
15 from the south.

16 In the 1996 Geodata aerial photograph, there is
17 shown there a clearly defined road extending into the
18 lower area. The landing area shown in Exhibit 6
19 would be off of that photograph to the south. On
20 September 17, 2002, which was ten years after the
21 Kaufman purchase, there is a color photograph that is
22 blurred showing green vegetation where the landing
23 was located.

24 In the photograph dated May 31, 2003, which is in
25 color and in focus, the road off the lower fork

1 extends well into the level of Lot F. I believe that
2 one can discern clearly there the end of pavement and
3 match it with other common features on that photo and
4 earlier photos to see that the road off the lower
5 fork is extending well into the lower level of Lot F.

6 Exhibit 12 is a septic design for Mr. Kaufman on
7 Lot F prepared by Hunter & Associates dated August 4,
8 2000, and submitted to Thurston County for its
9 consideration on August 7, 2000. Page 2 is a site
10 map from a survey with features drawn in showing a
11 defined road and landing in the form of a cul-de-sac
12 on the lower level of the property.

13 The exhibit submitted to Thurston County was
14 prepared by Mr. Yunker of Hunter & Associates.
15 Mr. Yunker was working in the immediate area of Lot E
16 in both 1995 and 1999 before preparing the work for
17 Mr. Kaufman on Lot F in 2000.

18 Lot E is 3.47 acres, more or less, per the survey
19 prepared by Mr. Friend. This is a topographical
20 survey. It shows a relatively flat lot on top and
21 very steep in the lower section south of the
22 easement. The Friend survey permits scaling of the
23 dimensions of the lower area between the easement and
24 the lakeshore. It is a rough trapezoid with an area
25 of approximately one-half acre. It is very steep.

1 In Exhibit 11, the city official who inspected the
2 property determined that the proposed building site
3 was at the top and the bottom of a hazardous slope
4 which is defined in the letter and in the law as a
5 slope greater than 50 percent. The letter concluded
6 that there was not a building site in that area
7 without a critical areas variance. And one of the
8 factors mentioned in that exhibit was that a variance
9 would be conditioned on no other room for a building
10 site, a condition that clearly does not apply to
11 Lot E. Although there may be precious little room
12 south of the easement road, there is ample room for a
13 building site above or to the north of the easement
14 road.

15 Mr. Dhanens opined that the grade of the lot below
16 the easement road to the south was 45 percent.
17 Mrs. Dhanens concurred that the site was very small
18 and could only accommodate a stacked house.
19 Mr. Strid testified that he told Mr. Friend that he
20 would have a very difficult time selling that lot;
21 that the site was too steep and too small. A site
22 visit confirms all of this.

23 There is a driveway of sorts to Lot E. This is
24 shown in Exhibit 29. But the photo does not show the
25 steepness of the driveway. The driveway does not

1 lead to any building site on the lot. If one exists,
2 that building site is well below the grade of that
3 roadbed. The roadbed is within the hazardous slope
4 area. It roughly parallels the paved lower fork
5 climbing up to it and converging until it turns
6 sharply right and intersects the paved lower fork at
7 a near right angle, just before the end of the
8 pavement.

9 There is no evidence that the roadbed that
10 intersects the lower fork in its present
11 configuration is a practical driveway to serve a
12 residence built on the lower section of Lot E. No
13 person testified to that use for the roadway. No
14 historical plans show this. And a visual inspection
15 confirms the extreme challenge that would be
16 encountered.

17 The McWaid's contend that the Road Easement and
18 Maintenance Agreement gives them the right to
19 traverse the paved lower fork within the easement
20 area to enter Lot F at that point. They do not
21 assert that the right to use the lower paved fork is
22 exclusive for the owner of Lot F. The Dhanens deny
23 McWaid's the right to use the lower paved fork within
24 the easement area. They contend that right is
25 exclusively for the owner of Lot E.

1 In the trial brief at page 2, Counsel writes,
2 "Defendants believe that the driveway to Lot E serves
3 that parcel alone."

4 But at the beginning of the controversy, Dhanens'
5 attorney, Mr. Hanemann, wrote the McWaids in the
6 letter Exhibit 16 that,

7 "You are entitled to travel over Dhanens' land on
8 the existing road within the described easement."

9 McWaids clearly prevail on the issue of their
10 right to use the paved lower fork within the easement
11 area as a part of the access to their Lot F. To
12 arrive at that finding, I look first at the language
13 of the easement. In paragraph 1 the easement is
14 described as, "a perpetual, non-exclusive easement
15 for the construction, maintenance, use, and operation
16 of a road for ingress, egress, and utility purposes
17 to serve the property described hereinabove"

18 In paragraph 2 the language states,

19 "The surface of the roadway shall be maintained as
20 to allow free and reasonable passage of such
21 vehicular traffic as may be reasonable and necessary
22 in order that all parties may enjoy full and
23 unrestricted use of the parcels of real property
24 served by said access roadway."

25 Nothing in the language suggests a single point of

1 access for each lot from the road constructed in the
2 easement area from the grantor. In fact, just the
3 opposite. The word "non-exclusive" and the
4 phrase "free and unrestricted use of the parcels"
5 refute that contention.

6 The only ambiguity possible in this language
7 arises from the circumstance that a portion of the
8 paved lower fork was constructed by the grantor
9 outside the easement area. Where ambiguous, the role
10 of the court is to determine the intent of the party
11 or parties to the document being interpreted and
12 enforced.

13 Here there was a single party. Mr. Friend
14 prepared and filed the Road Easement and Maintenance
15 Agreement without other parties joining him in that
16 endeavor. There is objective evidence in this case
17 of what Mr. Friend intended. First and foremost is
18 the Kaufman purchase itself. This was negotiated
19 before the easement was created.

20 Mr. Kaufman testified that he insisted on access
21 to both middle and lower portions of Lot F, the
22 middle for his house, the lower for his boathouse,
23 and that that was the basis for his interest in the
24 property. He was interested because of the view from
25 the middle part and access to lake from the lower

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part.

The logging road and landing is consistent with the express conditions on Kaufman's intent to purchase. We know that that road and landing did not exist in 1990 before Kaufman began his negotiations for the purchase of the property. We know it was there shortly after the purchase was concluded.

The third item of objective evidence is the widening of the easement to accommodate the fork. The widening of the easement was made without explanation. But viewing the evidence in its totality, there is no other reasonable explanation offered for the widening of the easement at the place where the fork is located.

Finally, there is the construction of the transformer and utility towers on Lot F at the end of the lower fork. These items are items that are described as being part of the easement. The easement is for utility purposes. These items were constructed at the lower end of the widened part of the easement immediately adjacent to the paved lower fork of the access road.

From these items of objective evidence, I find that the evidence establishes that Friend intended the lower fork as easement access to the lower

1 portion of Lot F. In making that finding, I indicate
2 that I rely upon the testimony of Mr. Kaufman about
3 his statements to Mr. Friend concerning his desires
4 for access to Lot F. I do not depend upon the
5 testimony from Mr. Kaufman about Friend's responses.
6 My findings are not dependent upon evidence of
7 Friend's expressed intention, even though that
8 evidence is arguably admissible under ER 803(b)(3).

9 The defendants, Mr. and Mrs. Dhanens, attempt to
10 create uncertainty in Friend's intent by introducing
11 statements made to prospective purchasers at that
12 time to create an inference that the lower fork was
13 intended exclusively for access to Lot E. Even
14 assuming that the memories of Strid and Spridgen are
15 accurate on this subject, neither is sufficient to
16 create the inference intended by Dhanens.

17 I conclude that the McWaids have a right to
18 traverse the paved lower fork within the easement
19 area for the purpose of accessing Lot F. As we know,
20 however, some portion of the paved lower fork lies
21 outside the described easement. McWaids in this
22 respect claim in the alternative, first, a
23 prescriptive easement across that portion of the
24 paved lower fork lying outside the described easement
25 area, and second, the right to access Lot F from the

1. easement off the paved road, in other words, by the
2. bypass. I find for the McWalds on both theories.

3 Kaufman owned Lot F from September 20, 1991, to
4 September 28, 2000, for nine of the ten years
5 required for prescriptive easement. I find his
6 testimony to be very credible. He testified that he
7 quite often used the subject property, sometimes
8 daily, sometimes weekly, sometimes monthly. Spring
9 and summer were times of special use. He drove to
10 the lower landing on the subject property created by
11 Mr. Friend for the purpose of fishing in
12 Lake St. Clair. Other times he was on the property
13 just to enjoy it.

14 His testimony in this respect is consistent with
15 the other evidence in this case. The first, of
16 course, is his announced purpose in purchasing the
17 property, which was access to the lake. One had to
18 cross the lower portion and access that lower portion
19 in order to access the lake. Second were the photos:
20 Exhibit 6 in 1992, the year following purchase;
21 Exhibit 28, the 1996 Geodata photo five years into
22 his ownership; and Exhibit 28, the 2003 photos,
23 Geodata; and the 5/13/2003 Google Earth photo, three
24 years after Kaufman's sale to shell. In all of those
25 paragraphs, the road is visible.

1 I conclude that evidence of Kaufman's use
2 describes the use one would expect of an owner of
3 vacant lakefront property where the owner intended to
4 build a home and purchased it for the purpose of
5 enjoying the lake.

6 Mr. Schell owned the property from September 2000
7 to June of 2004. It is important to review the law
8 of prescriptive easement in considering Mr. Schell's
9 ownership. The relevant time of ownership for
10 Mr. Schell is September 28, 2000, to September 20,
11 2001. My findings regarding the prescriptive
12 easement claim by Mr. Kaufman begin on September 28,
13 1991. That time is tacked onto Schell's ownership
14 until the ten years are satisfied, at which time a
15 prescriptive easement is established.

16 The law for prescriptive easement and adverse
17 possession is the same. In *McInnis v. Day Lumber*
18 *Company*, 102 Wash. 38, a 1918 case at page 41, our
19 Supreme Court declared in relevant part,

20 "Treating the acquired right as a prescriptive
21 right rather than the acquiring of title to the land,
22 the law applicable would be the same."

23 The ten-year period for prescriptive easement or
24 adverse possession is a statute of limitations.
25 While it is running, the claimant has a title of

1 sorts. After it has run, the title is the same as if
2 obtained by deed or written easement. To quote
3 Professor Stoebuck writing about adverse possession
4 in 17 Washington Practice section 8.6,

5 "While the statute is running, an adverse
6 possessor may be thought of as having inchoate title,
7 which, when the limitations period is fulfilled,
8 becomes perfected title; the chrysalis becomes a
9 butterfly."

10 Once the ten years establishes the right or title,
11 change in the pattern of use or frequency of use does
12 not matter; the right is established at ten years.
13 In *McInnis*, which I cited earlier, our Supreme Court
14 quoted and adopted a statement from the Supreme Court
15 of Nebraska to the following effect:

16 "It is elementary that, where the title has become
17 fully vested by disseisin [in other words, by adverse
18 claim] so long continued as to bar an action [in
19 other words, ten years], it cannot be divested by
20 parol abandonment or relinquishment or by verbal
21 declarations of the disseisor [in other words, the
22 claimant] nor by any other act short of what would be
23 required in a case where his title was by deed."

24 From that discussion of what the law is, I turn to
25 the facts regarding Schell's ownership. He purchased

1 the property for lakefront. He visited the lower
2 area, by his account, every time that he and his
3 family were there. He has no clear memory of how
4 many times he and his family visited the property; he
5 testified to at least a dozen times but indicated
6 that he thought he owned it for a two-year period,
7 not a four-year period.

8 Mr. Schell would access the lower area, by his
9 testimony, from the lower fork. He camped on the
10 property. He visited it to see the Dhanens' parked
11 RV in the easement area was a potential problem, and
12 so he contacted Mr. Dhanens about that issue. He
13 described the road down into the lower property off
14 the end of the paved lower fork, and he described the
15 cleared cul-de-sac at the end. He described that
16 they drove down that road. I conclude that evidence
17 of Schell's use describes the use one would expect of
18 an owner of vacant lakefront property where the owner
19 intended to build a home.

20 During the prescriptive right claim period, from
21 September 20, 1991, to 2001, Lot E had only one owner
22 other than Mr. Friend. Mr. Spridgen purchased the
23 property on October 2, 1991, and he sold it to the
24 Dhanens on June 18, 2003. He purchased within
25 several days of first viewing the property. He met

1 Mr. Friend once at the property to look at the
2 property and then returned to Germany until June of
3 1993. Then he was in the area for approximately two
4 years, leaving for Washington, D.C., about June 1995.

5 In Mr. Spridgen's visit with Mr. Friend in 1995,
6 Mr. Friend identified the lower fork as the point of
7 access to Lot E. Interestingly, Spridgen testified
8 about his conversation with Mr. Friend as follows:

9 "And other than that, the other road that we
10 walked down, which I'll call a driveway, because
11 that's what it was identified to me as, would be the
12 driveway down that lot. It would be my driveway if I
13 decided to -- because I was talking to him about
14 building down there, and he was the builder. So I
15 kind of wanted to find out what his expectations
16 were, being able to build a house down there. And he
17 was pretty positive about it. He said I wouldn't
18 have any problem building a house there."

19 After Spridgen returned from Germany, he began to
20 contemplate building in the lower part of Lot E. He
21 obtained from Mr. Friend a survey dated March 1994.
22 The survey shows the utility pedestal and transformer
23 on Lot F well south of the southern edge of the
24 easement and south of where the paved lower fork
25 would be. On the visit with Mr. Friend in

1 October 1991, Spridgen recalls discussing the
2 transformer and pedestal and being told that they
3 would serve Lot E.

4 In 1995 Spridgen began plans for construction of a
5 house on Lot E, working with Mr. Friend. He obtained
6 the septic plan from Hunter & Associates dated May 8,
7 1995, which is Exhibit 8. He testified about a plan
8 to have Friend change the configuration of the
9 driveway. He testified as follows:

10 "And we talked about taking this part of the road
11 out from in back -- back here somewhere and lowering
12 it so that I could make a less steep driveway for
13 myself in this area. So I was going to take this
14 down around five feet, I think, but I'm not sure if
15 he suggested that or if the fellow that had drawn up
16 the house plans. Because we had a lot of discussions
17 about the elevations through here. And so this was
18 going to make the driveway less steep and so that I
19 could get around here. And so we were talking about
20 taking all this asphalt out, this whole piece out
21 here, and go back up here - I don't know - maybe 25
22 feet, I will say, maybe 30 feet, and take this out
23 and lower this down."

24 At the end of that testimony, or later in his
25 testimony, Mr. Spridgen made clear that he was

1 talking about 25 to 30 feet back from the point of
2 the V where the forks began. Mr. Spridgen was ready
3 to begin work in June, but Mrs. Spridgen returned to
4 active duty, and they moved to Washington, D.C.,
5 thereby abandoning their plans. They were there for
6 at least a year, and after that Lot E was listed for
7 sale off and on..

8 It is not clear where Mr. Spridgen lived after
9 Washington, D.C. He was here at Lot E at least
10 occasionally clearing brush. We do know that in 2000
11 and thereafter, he was splitting time between Seattle
12 and North Carolina. He signed the sale papers for
13 the Dhanens in 2003 from Virginia. He only talked to
14 Mr. Friend one time after June 1995 to confront him
15 about construction of the water tower on Lot E.

16 The photographic evidence closest in time to when
17 Spridgen planned to cut the road down five feet and
18 then left for Washington, D.C. and then put the
19 property on the market is the 1996 Geodata aerial
20 photo, Exhibit 28. In that photo the north and south
21 edge of the upper fork are clearly visible and
22 terminate at the property line superimposed upon the
23 exhibit.

24 The north edge of the lower fork is similarly
25 visible in the photo. It extends beyond the

1 superimposed boundary a short distance, is.
2 interrupted by a tall tree because of the photo's
3 perspective from the south, and then beyond the tree
4 just as clearly extends into the lower part of Lot F,
5 curves slightly to the left and runs to the bottom of
6 the photo.

7 The 1992 aerial photo, Exhibit 6, is taken from a
8 northern perspective; the 1996 from the south. So
9 the perspectives in the two photos are somewhat
10 different. Nevertheless, the defined edge of road in
11 the 1996 picture matches the curve of the road in the
12 1992 picture. They are the same road, extending off
13 the end of the easement down into the lower portion
14 of Lot F. Mr. Spridgen's testimony is not consistent
15 with this photographic evidence.

16 Except to minimize Schell's use of the property,
17 the Dhanens challenge the evidence of the
18 prescriptive use by evidence of witnesses who seldom
19 saw others on Lot F. Mr. Spridgen first and
20 foremost; he was mostly absent, never lived on the
21 property, and was seldom there. I give little weight
22 to his testimony.

23 Mr. and Mrs. Dhanens lived on Lot D for a good
24 portion of the prescriptive claim time, but they
25 lived in their house well below the easement road. I

1 conclude that you cannot see Lot F from Lot D where
2 the Lot D building site is. The Dhanens owned Lot E
3 only during the last year of Schell's ownership,
4 after the prescriptive easement right had been
5 established.

6 Finally there was Mr. Johnson. Mr. Johnson can
7 fairly be described as confused. He denied several
8 obvious features on Lot F that are shown in the
9 photographs. He seemed to confuse access and cleared
10 area on the lower part of Lot F with access to water
11 and clearing at the water. But those are clearly two
12 separate or different areas. I gave no particular
13 weight to his testimony.

14 To establish a prescriptive easement, a claimant
15 must prove: (1) use adverse to the title owner; (2)
16 open, notorious, continuous, and uninterrupted use
17 for ten years; and (3) that the owner knew of the
18 adverse use when he was able to enforce his rights.

19 Element 3 is knowledge of the adverse use. The
20 McWaid's offered evidence of knowledge from the Friend
21 survey dated March 1994. But that evidence and
22 knowledge is immaterial, because the Dhanens and
23 Spridgen contended that the lower fork was a driveway
24 for the exclusive use of Lot E. The road to the
25 lower portion of Lot F extending directly off the end

1 of the lower fork and clearly visible in the
2 photographs from 1992, 1996, and 2003 are sufficient
3 notice, and they begin that period of notice to the
4 owner, Mr. Spridgen, well before the March 1994
5 survey.

6 Element 2 in a prescriptive easement claim is
7 continuous and uninterrupted use. Continuous and
8 uninterrupted use does not require the McWalds to
9 prove constant use of the paved easement area.
10 Instead, they need only to demonstrate use of the
11 same character that a true owner might make of the
12 property, considering its nature and location.

13 Here, during the prescriptive easement claim
14 period, the owners were not resident on the property.
15 The property was unimproved residential lakefront
16 property, and sporadic presence would be expected.
17 The defined roadway off the end of the paved fork is
18 evidence of its use to cross that fork to obtain
19 access to Lot F.

20 Even though the witnesses, primarily Mr. Spridgen
21 and Mr. and Mrs. Dhanens, had very little opportunity
22 to observe occupants on Lot F and even less
23 opportunity to see actual use of the paved area
24 outside of the described easement, that lack of
25 sighting was the result of Spridgen's absence and

1 later the Dhanens' location away from the sight line
2 to the paved fork.

3 I conclude that McWaids have proved by clear
4 evidence a prescriptive easement across the paved
5 lower fork that lies outside the easement area.
6 Coupled with their right to use the paved lower fork
7 within the easement area, they have the right of
8 access to the lower part of Lot F, across the paved
9 lower fork lying outside the easement area.

10 Even with the prescriptive access, I must decide
11 if the McWaids have a right to construct the bypass,
12 because the Dhanens have alleged trespass and waste
13 in that regard. I have already made findings
14 regarding Friend's intent in widening the easement
15 area to 60 feet in the area that he constructed the
16 fork. It was to permit access to the lower part of
17 Lot F.

18 I conclude that the rule in *Nazarenius* applies. It
19 is especially applicable here where the evidence is
20 clear that the grantor intended a forked easement
21 providing access to Lot F in both the middle and
22 lower sections, where the grantor constructed the
23 easement forks and placed a portion of the lower fork
24 outside the easement, and where the most affected
25 co-owner of the dominant estate created by the

1 easement relocated the lower fork entirely within the
2 easement area and between the two forks after the
3 owner of the dominant estate blocked his access
4 across the lower fork outside the easement area. I
5 conclude that the claim of trespass and waste is not
6 proved here.

7 Remaining in this case is the issue of the manner
8 in proceeding with the construction of the bypass and
9 the Letter Agreement. I will make findings of fact
10 in that respect, but the essential elements are not
11 disputed. It is not necessary for me, however, to
12 enter conclusions of law, because this aspect of the
13 case is not material to my decision.

14 As far as the findings of fact, I find that the
15 manner in which the McWaid's undertook to construct
16 the bypass without notice to the Dhanens was
17 unfortunate but was not in derogation of their right
18 to do so. After construction had begun, after it was
19 ceased because of the issue of whether a permit was
20 required, a permit was obtained, and construction by
21 the McWaid's continued. Thereafter it continued with
22 the agreement of Mr. and Mrs. Dhanens. And the
23 Letter Agreement prepared and submitted by the
24 defendants to the McWaid's is evidence of that
25 agreement to proceed. It is not, in my view, a

1 conveyance of an interest in property that must
2 comply with the statute of frauds. The conveyance of
3 the right of property within the easement area is
4 accomplished by the Road Easement and Maintenance
5 Agreement and then the subsequent sale of Lot F from
6 Mr. Friend to Mr. Kaufman and through that chain of
7 title. The Letter Agreement that is the object of
8 the dispute here is an agreement about how the rights
9 of the easement holder would be administered within
10 the easement area and did not require the types of
11 formality necessary to a conveyance of an interest in
12 property.

13 I further conclude that there is no evidence or
14 indication within the letter itself or within the
15 descriptions of the oral agreement made between the
16 parties that the parties agreed that it would be
17 anything less than an unconditional grant to permit
18 the bypass road, not a grant of right revocable at
19 will. And I agree with the law argued by the McWaid's
20 that unexpressed intentions of one party to an
21 agreement cannot be the basis for construing the
22 agreement.

23 I think that covers all of the issues in this
24 case, Counsel. My findings are in favor of the
25 McWaid's, and so they will have the responsibility to

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prepare findings and conclusions and a judgment consistent with my opinion here. I know the Dhanens pled the right to recover attorney's fees. I'm not sure that the McWaids did. Mr. Edwards, are you seeking any relief other than what has been granted in my decision here?

MR. EDWARDS: We did not plead a right to attorney's fees, Your Honor.

THE COURT: All right.

MR. EDWARDS: We probably will be asking for costs, but --

THE COURT: You would have those as the prevailing party. I will be gone until the 18th of November. So at that time or after that I would invite you to present these to me. That is my decision in the case.

MR. EDWARDS: Thank you, Your Honor.

THE COURT: Thank you, ladies and gentlemen.

(Conclusion of October 14, 2011, Proceedings.)

APPENDIX G

**Judgment
(CP 78-82)**

1 Susan Dhanens appear by and through their counsel Alan Wertjes.

2 The Court has considered the records and pleadings on file, in particular, the Findings of
3 Fact and Conclusions of Law which it entered prior to signing this Judgment, the Declaration of
4 Garth M. Johnson and the McWaid's Cost Bill.

5 In addition, the Court has considered the Oral Argument of counsel.

6 Based on the foregoing, the Court DIRECTS THE CLERK TO ENTER, AND HEREBY
7 ENTERS JUDGMENT as follows:

8 1. The McWaid's, the plaintiffs herein, own certain real property legally described as
9 Parcel F of Boundary Line Adjustment BLA-1031, as recorded February 27th, 1991, under
10 Auditor's File No. 9102270153, records of Thurston County, Washington and commonly
11 described as 5000 Friendly Cove Lane SE, Olympia, 98513 (hereinafter, the "McWaid
12 Property").

13 2. The Dhanens, the defendants herein, own certain real property adjoining the
14 McWaid Property, legally described as Parcel B of Boundary Line Adjustment No. BLA-1226 as
15 recorded July 2, 1992 under Auditor's File No. 9207020300 in Volume 12 of Boundary Line
16 Adjustment, pages 316 through 320, inclusive, in Thurston County, Washington, and commonly
17 described as 4934 Friendly Cove Lane SE, Olympia, 98513 (hereinafter, "Dhanen Property").

18 3. The Dhanens also own certain real property legally described as Parcel A of
19 Boundary Line Adjustment No. BLA-1226, as recorded July 2, 1992 under Auditor's File
20 No. 9207020300 in Volume 12 of Boundary Line Adjustment, pages 316 through 320, inclusive,
21 in Thurston County, Washington (hereinafter, the "Spridgen Property").

22 4. A Road Easement and Maintenance Agreement encumbers the Dhanen Property
23 and the Spridgen Property, et al., for the benefit of the McWaid Property. The Road Easement
24 and Maintenance Agreement is dated July 18, 1991 and was recorded with the Thurston County
25 Auditor on September 20, 1991 under Thurston County Auditor's File No. 9109200095. The
26 Road Easement and Maintenance Agreement creates an easement benefitting the McWaid

1 Property, and burdening the Dhanen Property and Spridgen Property, over an area legally
2 described therein. (Hereinafter, the "Road Easement Area").

3 5. The Court DECLARES that the McWaids are entitled to make reasonable use of
4 the Road Easement Area for purposes of ingress, egress, and utilities. Further, the McWaids
5 may utilize the entire Road Easement Area for the purpose of making full and unrestricted use of
6 their property. The McWaids may access the McWaid Property at different points from the Road
7 Easement Area, including, but not limited to, access to both the upper portion of the property
8 where the McWaids' home is presently located, and to the lower portion of the property
9 extending toward lake St. Clair, including in the manner in which the McWaids access
10 historically has been and/or presently is configured. The McWaids are entitled to utilize the area
11 legally described in the Road Easement and Maintenance Agreement for the purpose of
12 travelling between these two areas of the McWaid property.

13 6. The Court further DECLARES that the McWaids possess a prescriptive easement
14 over the following area located on the Spridgen Property:

15 That portion of Parcel A of Boundary Line Adjustment No. 1226 recorded July 2,
16 1992 under Auditor's File No. 9207020300, records of Thurston County,
Washington, described as follows:

17 Beginning at a point on the Westerly line of said Parcel A 563.78 feet
18 S 38° 30' 51" E of the most Westerly Northwest corner thereof; running thence
19 N 42° 27' 13" E 38.66 feet to the Southerly margin of easement described in Road
20 Easement and Maintenance Agreement document recorded September 6, 1991 under
Auditor's File No. 9109060213, records of said county; thence S 64° 16' 24" W
along said Southerly margin 39.16 feet to said Westerly line of Parcel A; and thence
S 38° 30' 51" E along said Westerly line 14.74 feet to the point of beginning.

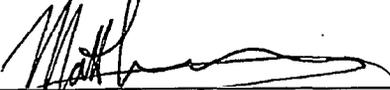
21 Situate in Thurston County, Washington.

22 (Hereinafter, the "Prescriptive Easement Area").

23 7. The Court further DECLARES the McWaids are entitled to use the Prescriptive
24 Easement Area for the same purposes and in the same manner which the McWaids are entitled to
25 utilize the Road Easement: for ingress, egress, and utilities, and for all the purposes which the
26 Court described in paragraph 5 of this Judgment.

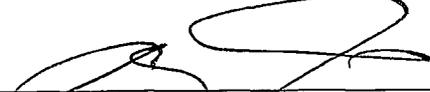
1 Presented by:

2 OWENS DAVIES FRISTOE
3 TAYLOR & SCHULTZ, P.S.

4 

5 Matthew B. Edwards, WSBA No. 18332
6 Attorneys for Plaintiffs

7 Approved as to form:
8 Notice of Presentation Waived

9 

10 Alan Wertjes, WSBA No. 29994
11 Attorney for Defendants

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